No. 90-79-CFX
Status: GRANTED

Title: Richard B. Kay, Petitioner
v.
Bremer Ehrler and Kentucky Board of Elections

Docketed:
July 11, 1990

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Dyk,Timothy B.

Counsel for respondent: Sheadel,Ann M.

Entry	Date	Note	Proceedings and Orders
1	Jul 11 1990	G	Petition for writ of certiorari filed.
2	Aug 3 1990		Waiver of right of respondents Ehrler, Bremer, et al. to respond filed.
3	Aug 8 1990		DISTRIBUTED. September 24, 1990
4	Aug 17 1990	F	Response requested -- JPS.
5	Sep 14 1990	X	Brief of respondents Ehrler, Bremer, et al. in opposition filed.
6	Sep 19 1990	X	Reply brief of petitioner Kay filed.
7	Oct 1 1990		Petition GRANTED.
			**********
8	Oct 11 1990	G	Motion of petitioner to dispense with printing the joint appendix filed.
9	Oct 29 1990		Motion of petitioner to dispense with printing the joint appendix GRANTED.
10	Nov 15 1990		Brief of petitioner Kay, Richard filed.
11	Nov 15 1990		Brief amicus curiae of Public Citizen filed.
12	Nov 21 1990		Record filed.
		*	Certified copy of original record and proceedings received.
13	Nov 28 1990	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
14	Dec 10 1990		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
15	Dec 17 1990		SET FOR ARGUMENT MONDAY, FEBRUARY 25, 1991. (4TH CASE)
16	Dec 19 1990		Brief of respondents Ehrler, Bremer, et al. filed.
17	Dec 19 1990		Brief amicus curiae of United States filed.
18	Dec 19 1990		Brief amici curiae of Hawaii, et al. filed.
19	Jan 9 1991		CIRCULATED.
20	Jan 22 1991	X	Reply brief of petitioner Richard Kay filed.
21	Feb 25 1991		ARGUED.

Supreme Court, U.S.
FILED
JUL 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

90-79

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD B. KAY,

Petitioner,

v.

BREMER EHRLER AND THE
KENTUCKY BOARD OF ELECTIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a losing defendant may avoid the payment of attorney's fees under 42 U.S.C. § 1988 solely because the action was brought by an attorney who represented himself.

PARTIES TO THE PROCEEDINGS

There are no petitioners or respondents in addition to those named in the caption.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. ____

RICHARD B. KAY,

Petitioner,

v.

BREMER EHRLER AND THE KENTUCKY BOARD OF ELECTIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Richard B. Kay respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-11a) is reported at 900 F.2d 967. The opinion of the district court (App., *infra,* 12a-17a) and the report and recommendation of the magistrate (*id.* at 19a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1990 (App., *infra,* 29a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1988, as amended by the 1976 Civil Rights Attorney's Fees Awards Act, provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

Petitioner, an attorney, brought a federal lawsuit on his own behalf in January of 1988 challenging the constitutionality of various Kentucky statutes governing the Commonwealth's presidential primaries. Approximately one year later, the district court granted summary judgment in petitioner's favor on virtually all of his substantive claims. Nonetheless, the court denied petitioner's request for attorney's fees under the 1976 Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, on the ground that an attorney who represents himself is ineligible for such fees (App., *infra,* 16a). In a split decision, the court of appeals affirmed the denial of attorney's fees (*id.* at 1a-11a).

1. The present lawsuit is actually petitioner's second challenge to the constitutionality of Kentucky's presidential primary statutes. Petitioner, a resident of Florida, has on more than one occasion run as a candidate for the office of President. Early in 1980, petitioner notified the Kentucky Board of Elections (the "Board") that he wished to appear on the Kentucky Democratic presidential primary ballot pursuant to Ky. Rev. Stat. § 118.580 (repealed in 1982). That statute provided that the Board shall nominate and place on the ballot presidential primary candidates, but it limited that opportunity, for those not qualifying by petition, to "all those [who are] generally advocated and nationally recognized" presidential candidates. On

April 2, 1980, the Board met to select names for the presidential primary ballot. At that meeting it determined that petitioner should not be placed on the ballot. Twelve days later, petitioner, acting pro se, filed suit in federal district court, alleging that Ky. Rev. Stat. § 118.580 was unconstitutional because of its "potential for discriminatory treatment of persons such as the [petitioner]." *Kay* v. *Mills,* 490 F. Supp. 844, 850 (E.D. Ky. 1980).

On April 23, 1980, the district court entered a preliminary injunction prohibiting the printing or distribution of Kentucky Democratic primary ballots that did not include petitioner's name. Nine days later, the court issued an opinion holding the statute unconstitutional. *Kay* v. *Mills, supra.* As a remedy, the court ordered that petitioner's name be placed on the ballot. 490 F. Supp. at 854-55. Although petitioner was the prevailing party and handled the case pro se, he did not seek attorney's fees.

2. After the district court rendered its decision, the Kentucky General Assembly repealed Ky. Rev. Stat. § 118.580. In 1986, however, it adopted an identically worded statute: Ky. Rev. Stat. § 118.581. App., *infra,* 21a.

On August 10, 1987, petitioner announced that he would again run for President. Four months later, he wrote to the Kentucky Secretary of State,[1] requesting that his name be presented to the Board for a decision on whether his name should be placed on the primary ballot. On January 11, 1988, petitioner was notified that because he was not a "nationally recognized" candidate, his name would not appear on the ballot. App., *infra,* 20a.

The following day, petitioner, again appearing pro se, filed the present lawsuit under the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution and under 42 U.S.C. §§ 1981, 1983, 1985, and 1988. He requested that Ky. Rev. Stat. § 118.581 be declared unconstitutional; that his name be

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1. At the time, the Secretary of State was Drexel Davis. Davis was later succeeded by respondent Bremer Ehrler. App., *infra,* 2a & n.1.

placed on the Commonwealth's presidential preference primary scheduled for March 8, 1988; that his "candidates' deposit" of $1,000 be refunded; and that the Kentucky statute governing candidates' deposits—Ky. Rev. Stat. § 118.611—be declared unconstitutional on the ground that it discriminated against candidates who do not receive a certain percentage of total votes.[2] App., *infra*, 1a-2a. On January 13, 1988, respondents—having ascertained that petitioner was the same person who had successfully filed suit in 1980—notified petitioner that his name had in fact been placed on the ballot (*id.* at 20a).

Subsequently, both petitioner and respondents moved for summary judgment on petitioner's remaining claims (App., *infra*, 2a). The district court referred the matter to a magistrate, who filed a report on September 13, 1988 (*id.* at 19a-28a). In his report, the magistrate stated that petitioner's lawsuit was not moot—even though the election was over and petitioner's name had appeared on the ballot—because "[t]he laws in question remain on the books and the problem posed for voters and future candidates, including [petitioner], remains unsolved without action" (*id.* at 20a-21a (citation omitted)). Relying on *Kay* v. *Mills*, *supra*, the magistrate recommended that Ky. Rev. Stat. § 118.581 be declared unconstitutional. He noted that "[t]he law has no greater constitutional support now than it did in 1980 . . . ." App., *infra*, 21a. Regarding the candidates' deposit statute, the magistrate found that Ky. Rev. Stat. § 118.611 violated the Due Process and Equal Protection Clauses because it "impose[d] fees only on minority candidates" (*id.* at 24a).

Although the magistrate stated that petitioner should be awarded "litigation costs" under 42 U.S.C. § 1988, he recommended that petitioner be denied his request for attorney's fees

2. Ky. Rev. Stat. § 118.611 provided that if a candidate failed to receive three percent of the vote cast in his party's primary, the $1,000 candidates' deposit would "escheat to the Commonwealth and be placed in a special trust and agency fund to be used by the secretary of state to defray election expenses."

under that statute. The magistrate reasoned that the latter issue was controlled by the Sixth Circuit's decision in *Falcone* v. *IRS*, 714 F.2d 646 (6th Cir. 1983), *cert. denied*, 466 U.S. 908 (1984), which held that a pro se attorney was ineligible for attorney's fees in an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E). App., *infra*, 27a-28a.

Both petitioner and respondents filed objections to the magistrate's report. The district court, after considering the objections *de novo*, concluded that the magistrate's recommendations were "correct in all respects" and thus adopted them as its own. App., *infra*, 12a. The court thus held that both Ky. Rev. Stat. § 118.581 and Ky. Rev. Stat. § 118.611 were unconstitutional. On the issue of attorney's fees, the court summarily rejected petitioner's argument, noting simply that the magistrate had correctly analyzed the issue. App., *infra*, 16a.

3. Petitioner appealed the denial of attorney's fees to the Sixth Circuit. In a published opinion, the Sixth Circuit affirmed, with Judge Jones dissenting (App., *infra*, 1a-11a). The court acknowledged at the outset that while most circuits had denied attorney's fees under 42 U.S.C. § 1988 to nonlawyers appearing pro se, "courts have seen quite a different issue when the pro se civil rights plaintiff was also an attorney" (App., *infra*, 5a). The court noted that the cases were divided, with most courts concluding that a pro se attorney is entitled to attorney's fees under 42 U.S.C. § 1988 (*id.* at 5a-6a & n.2).

The court pointed out that several courts addressing the issue had looked for guidance to attorney's fees case law under the FOIA (App., *infra*, 6a-7a). In that context as well, the court acknowledged, the decisions were divided (*id.* at 7a). Nonetheless, since the Sixth Circuit, in *Falcone* v. *IRS*, *supra*, had specifically held that pro se attorneys could not recover fees in the FOIA context, the court felt bound to follow that decision in the context of section 1988 (*id.* at 7a-9a).

The court also concluded that the "plain language" of section 1988 "assumes a paying relationship between an attorney and a client" (App., *infra*, 8a). Furthermore, the court stated

that under *Falcone*, attorney's fees should not be allowed for a variety of policy reasons, including the risk of creating a "cottage industry" of inactive lawyers filing pro se civil rights cases; because "opportunity costs [do not] constitute actual pecuniary losses for which [pro se attorney] litigants should be compensated"; and because attorneys who handle their own cases cannot screen them objectively to eliminate meritless ones. *Id.* at 7a (citing 714 F.2d at 647-48). Finally, the court noted that "[w]hile we cannot condone the Commonwealth's conduct in this case, attorney's fees, as [petitioner] concedes, under section 1988 are not awarded as penalties or sanctions" (App., *infra*, 9a).

Judge Jones dissented (App., *infra*, 9a-11a). While he "[did] not challenge *Falcone*'s reading of the statutory purposes underlying the FOIA," he stated that "the concern [raised in *Falcone*] with 'objective' lawsuits and a cottage industry of fee-generating lawyers is not as great [under section 1988] . . ." (App., *infra*, 10a-11a).[3]

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question concerning the entitlement to attorney's fees under 42 U.S.C. § 1988. Rejecting the approach of two other circuits, the Sixth Circuit has ruled that an attorney appearing pro se is not entitled to attorney's fees under that statute. The decision below, if allowed to stand, would frustrate Congress's objective of ensuring vigorous enforcement of the civil rights laws. Furthermore, the decision has implications that extend far beyond section 1988, since numerous other attorney's fees statutes contain identical or similar language. This Court's review is plainly warranted.

1. Several circuits have considered whether an attorney appearing pro se is entitled to attorney's fees under various federal statutes. The resulting decisions are sharply divided. *See*

3. On May 16, 1990, the Sixth Circuit denied petitioner's motion for extension of time for filing a petition for rehearing (App., *infra*, 30a).

Jones v. *Lujan*, 883 F.2d 1031, 1038-39 (D.C. Cir. 1989) (Silberman, J., concurring) (noting that "[t]he courts of appeals are hopelessly divided" and that "Supreme Court review is most appropriate").[4] The court below acknowledged this conflict (*see* App., *infra*, 5a-7a), and respondents have conceded it as well (*see* Resp. C.A. Br. 9).

In contrast to the Sixth Circuit, both the Eleventh and the Ninth Circuits have held that attorney's fees for pro se attorneys are permitted under section 1988. *Duncan* v. *Poythress*, 777 F.2d 1508, 1516 (11th Cir. 1985) (*en banc*), *cert. denied sub nom., Poythress* v. *Kessler*, 475 U.S. 1129 (1986);[5] *Ellis* v. *Cassidy*, 625 F.2d 227, 230-31 (9th Cir. 1980).

In *Duncan*, the attorney-plaintiff had previously prevailed in her claim that the refusal of Georgia officials to call a special election to fill a State Supreme Court vacancy violated her right to vote. The sole issue before the Eleventh Circuit was whether she was entitled to attorney's fees. After explaining that neither the language nor the legislative history of section 1988 precluded an award of attorney's fees to a pro se attorney, the court concluded that the purposes of the statute favored such an award. It noted that "[m]erely because plaintiff . . . need not pay an actual fee . . . does not mean that she is able to spend the time and pay the overhead involved in this case, absent at least the hope of remuneration." 777 F.2d at 1511-12. The court also cited the "anomaly" that any other person raising plaintiff's voting rights claim could have hired plaintiff, and she would have been entitled to attorney's fees. *Id.* at 1513. Furthermore, the court rejected the argument that

4. *See also* Note, *Awarding Attorney's Fees to Prevailing Pro Se Litigants*, 80 Mich. L. Rev. 1111, 1112 (1982) ("[T]he courts of appeals have reached conflicting conclusions on this issue."); Note, *To Fee, or Not to Fee: The Dilemma of the Pro Se Attorney in Collecting Attorney's Fees*, 16 W. St. U.L. Rev. 303, 315 (1988) (noting inter-circuit conflict and urging the Supreme Court to "resolve this critical issue").

5. Chief Justice Burger, joined by Justice White, dissented from the denial of certiorari in *Poythress*, noting that review was warranted because of inter-circuit conflicts on closely related issues, including the entitlement of pro se attorneys to fees under the FOIA. 475 U.S. at 1129-30.

a pro se attorney "lack[ed] the objectivity necessary to provide a check against groundless or frivolous litigation," *id.* at 1514, and noted that the concern for competent legal representation, which warranted prohibiting attorney's fees for nonlawyers, was inapplicable to lawyers. *Id.* at 1513.

Similarly, in *Ellis,* the Ninth Circuit held that various attorneys who successfully defended a civil rights suit filed against them were entitled to attorney's fees.[6] The *Ellis* court pointed out that the attorneys "actually suffered pecuniary loss" by having to take time away from their practices to defend the case, that they in fact performed legal services, and that "[t]he difficulty of placing a dollar value on the legal services performed, present in the situation where a lay defendant represents himself, is largely absent in the case of an attorney who has established fees and billing practices." 625 F.2d at 230-31.[7]

The decision below is squarely and irreconcilably in conflict with the decisions of the Eleventh Circuit in *Duncan* and the Ninth Circuit in *Ellis.* Unless this Court resolves the conflict, a pro se attorney's entitlement to fees will depend on the fortuity of which court has jurisdiction over the case.

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6. Although the pro se attorney was the defendant rather than the plaintiff, its reasoning is applicable in either context. *See Duncan,* 777 F.2d at 1510 (relying on *Ellis*).

7. Although the Fifth Circuit has not squarely addressed the issue in the specific context of section 1988, it recently suggested in dictum that it would follow the approach taken in *Duncan* and *Ellis:* "Under the law of this circuit, a pro se litigant who is an attorney by profession may receive attorney's fees in cases in which attorney's fees are authorized by statute." *McLean* v. *Int'l Harvester Co.,* 902 F.2d 372, 374 & n.9 (5th Cir. 1990) (referring to the FOIA as an "example"). The Seventh and the District of Columbia Circuits have not addressed the issue under section 1988, but district courts in those circuits have done so, with conflicting results. *Shakman* v. *Democratic Org. of Cook County,* 634 F. Supp. 895, 901 (N.D. Ill. 1986) (allowing pro se attorneys to recover attorney's fees under 42 U.S.C. § 1988); *Rybicki* v. *State Bd. of Elections,* 584 F. Supp. 849, 860 (N.D. Ill. 1984) (same); *Lawrence* v. *Staats,* 586 F. Supp. 1375, 1380-81 (D.D.C. 1984) (refusing to award such fees).

Review in this Court is also important because a similar conflict exists with respect to cases arising under the Freedom of Information Act's attorney's fees provision, 5 U.S.C. § 552(a)(4)(E).[8] Both the Fifth and the District of Columbia Circuits permit attorney's fees for pro se attorneys under the FOIA, whereas the First and Sixth Circuits have held that such fees are not permitted. *Compare Cazalas* v. *United States Dep't of Justice,* 709 F.2d 1051, 1057 (5th Cir. 1983), *Cox* v. *United States Dep't of Justice,* 601 F.2d 1, 5-6 (D.C. Cir. 1979), *and Cuneo* v. *Rumsfeld,* 553 F.2d 1360, 1366 (D.C. Cir. 1977), *with Aronson* v. *Dep't of Housing and Urban Dev.,* 866 F.2d 1, 4-6 (1st Cir. 1989), *and Falcone* v. *IRS,* 714 F.2d 646, 648 (6th Cir. 1983), *cert. denied,* 466 U.S. 908 (1984). *See* Note, *Attorney Fees, Freedom of Information, and Pro Se Litigants: Per Se Prohibitions Frustrate Policies,* 26 Wm. & Mary L. Rev. 349, 350 (1985) (noting inter-circuit conflict in the FOIA context).[9] Resolution of the conflict with respect to the implementation of section 1988 is also likely to resolve this conflict in the FOIA cases.

2. The issue in this case is unquestionably one of great importance, as the considerable law review commentary has recognized. *See, e.g.,* authorities cited in note 4, *supra.* Moreover, as the case law demonstrates, it has arisen frequently, and pro se attorneys have been responsible for redressing important constitutional violations. *See, e.g., Duncan* v. *Poythress, supra* (violation of voters' rights by failure of Georgia officials to declare special election); *Rybicki* v. *State Bd. of Elections of State of Ill.,* 584 F. Supp. 849 (N.D. Ill. 1984) (successful challenge

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8. That provision, which is similar to 42 U.S.C. § 1988, provides that "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E).

9. While the Fourth Circuit has not considered the issue under the FOIA, it has held that a pro se attorney is not entitled to attorney's fees under the Truth in Lending Act, 15 U.S.C. § 1640(a). *White* v. *Arlen Realty & Development Corp.,* 614 F.2d 387, 388-89 (4th Cir.), *cert. denied,* 447 U.S. 923 (1980).

to legislative redistricting plan for election of candidates to Illinois General Assembly). Indeed, this case strongly illustrates the point: petitioner fought and won two lawsuits challenging Kentucky's system for placing presidential primary candidates on the ballot. The issue, as the magistrate noted, was one that affected not just petitioner but also "voters and future candidates" (App., *infra*, 20a). By holding that pro se attorneys are ineligible for attorney's fees, the Sixth Circuit has removed a significant incentive for such individuals to litigate civil rights violations.

The decision below, if interpreted broadly, could preclude attorney's fees not only to pro se lawyers but also to businesses, public interest organizations, and other entities whose in-house counsel bring civil rights actions.[10] Whether or not it is applied to such entities, the decision below, if not corrected, will have implications extending far beyond section 1988. There are more than 100 federal statutes authorizing attorney's fees, *see Marek* v. *Chesny*, 473 U.S. 1, 44-51 (1985) (Brennan, J., dissenting) (collecting statutes), and many of them contain wording that is identical or similar to section 1988. Indeed, section 1988 was patterned after the attorney's fees provisions in Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), 42 U.S.C. § 2000e-5(k), and contains wording that in all relevant respects is identical to those statutes. *See* 121 Cong. Rec. 26806 (1975) (statement by Sen. Tunney, sponsor of § 1988, noting connection to Titles II and VII); *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 758 n.5 (1980) (noting that § 1988 and Title VII "authorize fee awards in identical language, and Congress acknowledged the close connection between the two statutes when it approved § 1988"). The wording of section 1988 is also essentially identical to the Voting Rights Act attorney's fees provision, 42 U.S.C.

10. The Third Circuit, apparently the only court of appeals to consider explicitly the issue of pro se lawyers in the organizational context, upheld the award of attorney's fees. *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 762 F.2d 272, 278 (3d Cir. 1985), *aff'd in part and rev'd in part on other grounds*, 478 U.S. 546 (1986).

§ 1973(*l*)(e). *See* 121 Cong. Rec. 26806 (1975) (statement of Sen. Tunney noting identical language in section 1988 and Voting Rights Act).[11] Thus, the interpretation of section 1988 is likely to govern those statutes as well.

3. On the merits, the court below seriously erred in denying attorney's fees to pro se attorneys under section 1988. Contrary to the court's assertion that the "plain language" of section 1988 "assumes a paying relationship between an attorney and a client" (App., *infra*, 8a), nothing in that statute even refers to a client, let alone to a paying relationship.[12] The awarding of attorney's fees to pro se lawyers is entirely consistent with the statutory language—which simply permits the court to award "the prevailing party . . . a reasonable attorney's fee as part of the costs." *Cf. Jones* v. *Lujan*, 883 F.2d at 1035 (noting, in awarding fees to pro se attorney, that language of Equal Access to Justice Act "in no way rules out an attorney legitimately representing himself").

Moreover, the policies of the statute strongly support the awarding of fees in such cases. In enacting section 1988, Congress made clear that "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976), at 1; *see also* 122 Cong. Rec. 31471 (1976) (statement of Sen. Scott) ("Congress should encourage citizens to go to court in private suits to vindicate its policies and protect their rights."). The denial of attorney's fees to pro se attorneys undermines Congress's intent by reducing the incentive for an important category of litigants to expose civil rights violations.

11. Several other attorney's fees statutes, while not identical to section 1988, contain wording that, for all practical purposes, is indistinguishable. These include, among others, the Equal Access to Justice Act, 28 U.S.C. § 2412(b) and (d); the Truth in Lending Act, 15 U.S.C. § 1640(a)(3); and the Copyright Act, 17 U.S.C. § 505.

12. This Court has made clear that the absence of a paying relationship is not relevant to the question of attorney's fees: "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." *See Blum* v. *Stenson*, 465 U.S. 886, 891 (1984).

Finally, while there may be policy arguments for not awarding attorney's fees to nonlawyers who represent themselves, such arguments are inapplicable to pro se attorneys. First, Congress's goal of ensuring that civil rights victims are effectively represented, *see* 122 Cong. Rec. 31471 (1976) (testimony of Sen. Scott); *Owens-El* v. *Robinson*, 694 F.2d 941, 942-943 (3d Cir. 1982), is not jeopardized if the person filing the claim is a trained attorney. Second, "[t]he difficulty in placing a dollar value on the legal services performed" does not arise when the party is a lawyer, who typically "has established fees and billing practices." *Ellis, supra*, 625 F.2d at 231. Third, since section 1988 authorizes attorney's fees only for the "prevailing" party, attorneys would not be encouraged to bring frivolous lawsuits. In any event, if a patently meritless suit were brought, there are adequate sanctions, such as Federal Rule of Civil Procedure 11, to address the problem.

In sum, the Sixth Circuit has misread the language of section 1988, misapplied its purposes, and failed to recognize the critical distinctions between pro se lawyers and pro se nonlawyers. This erroneous decision should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 11, 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-5297

RICHARD B. KAY, PLAINTIFF-APPELLANT,

v.

BREMER EHRLER, AND THE KENTUCKY BOARD OF ELECTIONS,
DEFENDANTS-APPELLEES.

Argued Feb. 9, 1990.
Decided April 13, 1990.

Before: JONES and MILBURN, Circuit Judges; and BELL, District Judge.*

MILBURN, Circuit Judge.

The district court denied plaintiff-appellant Richard B. Kay's petition for attorney's fees on the ground that an attorney who represents himself cannot recover fees pursuant to 42 U.S.C. § 1988. For the reasons that follow, we AFFIRM.

I.

A.

Kay, proceeding *pro se*, initiated this action by filing a complaint and a motion for a temporary restraining order and preliminary injunction on January 12, 1988. He brought his action under the First, Fifth, Sixth, and Fourteenth Amendments and 42 U.S.C. §§ 1973, 1981, 1983, 1985 and 1988, alleging that several Kentucky statutes that govern the state's presidential preference primaries violated his constitutional rights. He

*Honorable Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

requested that the district court declare Ky.Rev.Stat.Ann. §§ 118.581 and 118.611 to be unconstitutional; place his name on the ballot for the state's presidential preference primary scheduled for March 8, 1988; and order the state to refund his "candidates' deposit" of $1,000 required by section 118.611. He named Kentucky Attorney General Fred Cowan and the Kentucky Secretary of State at the time, Drexel Davis, as defendants.

On January 14, 1988, newly installed Secretary of State Bremer Ehrler notified Kay that the Kentucky Board of Elections had agreed to place his name on the Democratic primary ballot. This action rendered Kay's request for injunctive relief moot.[1]

After discovery, both Kay and the defendants moved for summary judgment. The district court referred the matter to the magistrate, who filed a report on September 13, 1988. He recommended that Ky.Rev.Stat.Ann. §§ 118.581 and 118.611 be declared unconstitutional; that the state refund Kay's deposit; and that Kay be awarded his "litigation costs," but not attorney's fees. Kay filed an objection to the denial of his petition for fees with the district court, and the defendants requested clarification of the phrase "litigation costs."

On January 19, 1989, the district court entered an order adopting the magistrate's recommendations and making additional findings of fact. The district court agreed with the defendants that Kay's "litigation costs" included only his actual court costs, and not the costs he incurred in personally traveling from Florida to Kentucky to file his pleadings. The district court also agreed with the magistrate that under the applicable Sixth Circuit precedent, *pro se* attorney-plaintiffs may not recover attorney's fees pursuant to 42 U.S.C. § 1988. On

1. Kay filed a second amended complaint on March 10, 1988, wherein he dropped Davis as a defendant and named Ehrler, who replaced Davis in January 1988. He also added the Kentucky Board of Elections as a defendant.

February 22, 1989, the district court amended its order of January 19, 1989, and ordered the defendants to return Kay's deposit. Kay then filed this timely appeal.

B.

Kay is a resident of the State of Florida, a licensed attorney, and a registered member of the Democratic Party in Palm Beach County, Florida. He announced on August 10, 1987, that he would seek the Democratic nomination for the office of President of the United States. This was at least the second time he had sought the nomination, as he was also a candidate in 1980. *See Kay* v. *Mills,* 490 F. Supp. 844 (E.D. Ky. 1980).

In December 1987, Kay wrote to Kentucky Secretary of State Davis, asking that his name be presented to the Board of Elections at its meeting on January 8, 1988. State election laws provided that when the board met in January, it would decide which candidates would appear on the ballot for the upcoming presidential primary.

On January 2, 1988, elections officials notified Kay that pursuant to state elections laws, the elections board had decided that candidates who wished to appear on the presidential primary ballot had to be "nationally recognized." Furthermore, the board had decided that it would deem those candidates who had been certified by the Federal Elections Commission for matching federal campaign funds to be "nationally recognized." Kay did not qualify for federal matching funds, and the board did not name him to the primary ballot.

None of this was new to Kay, who encountered similar difficulties when he sought a place on the Kentucky presidential primary ballot in April 1980. He challenged the constitutionality of Ky.Rev.Stat.Ann. § 118.580, prevailed, and the district court ordered that his name be placed on the ballot. *See Kay* v. *Mills,* 490 F. Supp. 844 (E.D. Ky. 1980).

In 1982, the Kentucky General Assembly repealed section 118.580 and in 1986, it enacted section 118.581, which Kay challenges in this litigation. The state concedes that section

118.581 is "essentially the same statute" as the unconstitutional one it replaced.

On January 14, 1988, two days after Kay filed this action, the elections board placed his name on the primary ballot. The parties continued to engage in discovery into Kay's challenge to the election laws until August 1988.

Before the magistrate, Kay prevailed on nearly all of his claims, including his civil rights claims. Nevertheless, the magistrate explained that we had held that an attorney *pro se* litigant could not recover attorney's fees under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)E). *See Falcone* v. *IRS,* 714 F.2d 646, 648 (6th Cir. 1983), *cert. denied,* 466 U.S. 908, 104 S.Ct. 1689, 80 L.Ed.2d 162 (1984). The magistrate concluded that "it is unlikely the Sixth Circuit would reach a different conclusion on this issue specifically under section 1988 unless it chooses to somehow distinguish the application of the reasoning in *Falcone.*" Accordingly, the magistrate recommended that Kay's petition for attorney's fees be denied, and the district court so ordered.

The sole issue presented in this appeal is whether a *pro se* plaintiff who is an attorney and who prevails on a civil rights claim is entitled to attorney's fees pursuant to section 1988.

II.

This is an appeal of the district court's conclusions of law, which are subject to de novo review. *Loudermill* v. *Cleveland Bd. of Educ.,* 844 F.2d 304, 308 (6th Cir.), *cert. denied,* ____ U.S. ____, 109 S.Ct. 363, 102 L.Ed.2d 353 (1988).

A.

It is settled law in the majority of circuits that non-attorney plaintiffs who proceed *pro se* and prevail in civil rights actions cannot recover attorney's fees under section 1988. *See Gonzalez* v. *Kangas,* 814 F.2d 1411, 1412 (9th Cir. 1987) and cases cited therein. This decision rests on the intent of section 1988, which was passed to ensure that litigants who prevailed on

claims based upon 42 U.S.C. §§ 1981–85 could recover the costs of their attorneys' services. *See Pitts* v. *Vaughn,* 679 F.2d 311, 312 (3d Cir. 1982); *see also* S.Rep. No. 94–1011, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S.Code Cong. & Admin.News 5908, 5910. The courts have held that section 1988 was not intended to reward or compensate *pro se* litigants, as it "presupposes a relationship of attorney and client" that does not exist when the plaintiff proceeds *pro se. See Davis* v. *Parratt,* 608 F.2d 717, 718 (8th Cir. 1979) (per curiam).

However, courts have seen quite a different issue when the *pro se* civil rights plaintiff was also an attorney. Four of the five courts that have addressed this issue have held that a *pro se* plaintiff-attorney can recover attorney's fees under section 1988 for representing himself. The leading case is *Duncan* v. *Poythress,* 777 F.2d 1508 (11th Cir. 1985) (en banc), *cert. denied,* 475 U.S. 1129, 106 S.Ct. 1659, 90 L.Ed.2d 201 (1986), wherein the court held that an attorney who became a plaintiff in the latter stages of the litigation of a section 1983 claim could recover attorney's fees under section 1988 for the time she spent representing herself.

In *Duncan,* the court found it significant that section 1988 does not expressly bar such an award. It noted that awarding fees to *pro se* attorneys furthered several of the purposes of section 1988, including encouraging private citizens to act as private attorneys general and serve the public interest by bringing suits to vindicate civil rights. *Duncan,* 777 F.2d at 1512; *see also Hamilton* v. *Daley,* 777 F.2d 1207, 1211 (7th Cir. 1985).

The court also cited the opportunity costs of bringing a *pro se* action as a reason to award fees. *Duncan,* 777 F.2d at 1514. Opportunity costs consist primarily of the time and energy an attorney spends on the *pro se* case, overhead, and other fixed costs. The concept of opportunity costs rests on the assumption that the *pro se* attorney has an otherwise full load of work, and he or she would have been busily billing hours to clients but for his *pro se* work. In *Duncan* the court held that opportunity costs constitute actual, pecuniary losses incurred while

vindicating constitutional and congressional policies—the precise situation that section 1988 was intended to address—and, therefore, *pro se* attorneys may recover fees under section 1988.[2]

The only reported decision to deny attorney's fees is *Lawrence* v. *Staats*, 586 F. Supp. 1375, 1380–81 (D.D.C. 1984). The court found no reason to distinguish between *pro se* laymen plaintiffs, who cannot recover under section 1988, and *pro se* plaintiffs who happened to be licensed to practice law. The court also rejected the opportunity costs argument on the ground that section 1988 was not intended to compensate attorneys for the opportunity costs involved in prosecuting a lawsuit, but only for those legal services that were related to providing the prevailing claims. *Id.* at 1379.

B.

Several of the courts that have faced the issue of awarding fees to *pro se* attorneys under section 1988 have looked for guidance in decisions interpreting other federal statutory fee provisions. The majority of these interpretive decisions have involved the Freedom of Information Act, which provides in part:

> (E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

5 U.S.C. § 552(a)(4)(E).

Nine circuits, including the Sixth Circuit, have held that *pro se* non-attorney plaintiffs cannot recover attorney's fees under the FOIA. *See Aronson* v. *United States Dep't of Hous. and*

2. Other decisions which have allowed *pro se* attorneys to recover attorney's fees under section 1988 include *Ellis* v. *Cassidy*, 625 F.2d 227, 230–31 (9th Cir. 1980); *Shakman* v. *Democratic Org. of Cook County*, 634 F. Supp. 895, 901 (N.D. Ill. 1986); *Lanasa* v. *City of New Orleans*, 619 F. Supp. 39, 45 (E.D. La. 1985); *Rybicki* v. *State Bd. of Elections*, 584 F. Supp. 849, 860 (N.D. Ill. 1984).

Urban Dev., 866 F.2d 1, 4 (1st Cir. 1989) and cases cited therein.

Four courts have considered whether *pro se* plaintiff-attorneys may recover fees under the FOIA. This circuit and the First Circuit have held that they cannot; the D.C. and Fifth Circuits have held they can. *Compare Aronson*, 866 F.2d at 4–5 and *Falcone* v. *IRS*, 714 F.2d 646, 648 (6th Cir. 1983), *cert. denied*, 466 U.S. 908, 104 S.Ct. 1689, 80 L.Ed.2d 162 (1984) *with Cazalas* v. *United States Dep't of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983), and *Cox* v. *United States Dep't of Justice*, 601 F.2d 1, 5–6 (D.C.Cir. 1979).

We held in *Falcone* that fees should not be awarded because *pro se* plaintiffs who are also attorneys do not incur the type of legal costs contemplated by the statutory provision for fees. *Falcone*, 714 F.2d at 647. In reaching this holding, we rejected the proposition that opportunity costs constitute actual pecuniary losses for which litigants should be compensated. *Id.* at 648.

We explained in *Falcone* that one purpose of a statutory provision for attorney's fees is "to encourage potential claimant to seek legal advice before commencing litigation," with the hope that "the retention of legal counsel might help to prevent unnecessary litigation." *Id.* at 647. However, this filtering does not occur where the attorney represents himself. In reaching our holding, we also cited the concern that awarding fees to a *pro se* attorney would lead to the establishment of a "cottage industry" of inactive lawyers who would support themselves on statutory fee awards for self-generated litigation. We explained that "[w]e do not believe that Congress intended to so subsidize attorneys without clients." *Id.* at 648 (footnote omitted). We concluded that "[t]he fortuitous fact that [a prevailing] FOIA plaintiff is also an attorney makes no difference. Both a client and an attorney are necessary ingredients for an award of fees in a FOIA case."[3] *Id.*

3. The First Circuit found our arguments in *Falcone* to be persuasive and followed them in 1989. *See Aronson*, 866 F.2d at 6.

C.

The magistrate concluded in this case that Kay's petition for attorney's fees fell within *Falcone* and denied it. We agree, based upon our rejection in *Falcone* of the proposition that opportunity costs constitute actual pecuniary losses for which a *pro se* attorney deserves compensation. As we stated in *Falcone,* "no legal costs are incurred" by *pro se* plaintiffs who are also attorneys. *Falcone,* 714 F.2d at 647. Assuming that Kay spent hours prosecuting this case that he could have billed to clients, he has only failed to add to the wealth of his private practice. He has not incurred any expenses for legal representation, and, therefore, he cannot recover under section 1988.

Falcone is a FOIA case, but that does not distinguish it from this appeal. Were we to hold that Kay's opportunity costs constituted pecuniary losses, when we had previously held that Falcone's opportunity costs were not, we would begin classifying opportunity costs as legal expenses based upon the substance of the *pro se* claim. We find no authority for awarding fees based on such a system.

There are several other reasons why Kay should not recover fees under section 1988. First, while *Duncan* emphasized the lack of an expressed prohibition against awarding fees to *pro se* attorneys in section 1988, we held in *Falcone* that the "plain language" of a statutory provision for attorney's fees assumes a paying relationship between an attorney and a client. *Falcone,* 714 F.2d at 648.

Second, while some courts have found the purposes of section 1988 are fulfilled when an attorney "hires himself" to litigate a civil rights claim, we stressed in *Falcone* that where the advocate is also the claimant, there is no filtering of meritless claims by objective attorneys, and, therefore, one of the major objectives of the statutory provision for attorney's fees was frus[illegible]ted. *Id.* at 647. Additionally, we held in *Falcone* that the fact that the public might benefit from a *pro se* attorney's action did not make him more deserving of fees than a *pro se* non-attorney plaintiff. *Id.* at 648.

Kay argues that he is entitled to the fees because the commonwealth of Kentucky has engaged in the vexatious modification of its election laws. He points out that he brought an identical action in 1980, and won, and has had to repeat that effort here. While we cannot condone the Commonwealth's conduct in this case, attorney's fees, as Kay concedes, under section 1988 are not awarded as penalties or sanctions.

III.

We held in *Falcone* that when an attorney represents himself, he does not incur any legal costs or pecuniary losses that constitute "attorney's fees." Though *Falcone* was an FOIA case, we hold that its rationale applies to section 1988 as well. It is clear to us that the *pro se* plaintiff-attorneys in this case vindicated a constitutional right, the substance of which is clearly distinguishable from the substance of the matter in *Falcone.* Nevertheless, for the reasons we have explained, we feel bound to follow the rationale of *Falcone* in this case. Accordingly, for the foregoing reasons, the judgment of the district court is AFFIRMED.

JONES, Circuit Judge, dissenting.

Because I believe that *Falcone* v. *IRS,* 714 F.2d 646 (6th Cir. 1983) is distinguishable, I respectfully dissent.

The *Falcone* court held that an attorney litigant could not recover attorney's fees for successful release of documents under the Freedom of Information Act (FOIA) for three reasons. First, "[t]he award of attorney's fees to successful FOIA plaintiffs was intended to relieve plaintiffs with legitimate claims of the burden of legal costs; it was not intended as a reward for successful claimants or as a penalty against the government." *Id.* at 647. "A second reason [in *Falcone*] for denying fees to *pro se* FOIA plaintiffs is that the provision for attorney's fees was intended to encourage potential claimants to seek legal advice. . . . It was hoped that retention of legal counsel might help prevent unnecessary litigation. An attorney

who represents himself in litigation may have the necessary legal expertise but is unlikely to have the 'detached and objective perspective' necessary to fulfill the aims of the Act." *Id.* The final rationale of *Falcone* was that providing attorney's fees to attorney-litigants would create a "cottage industry" for claimants using the Act solely as a way to generate fees rather than to vindicate personal claims. The *Falcone* court reasoned that Congress did not intend to "subsidize attorneys without clients." *Id.* at 648.

The majority reads *Falcone* as a rejection of "the proposition that opportunity costs constitute actual pecuniary losses for which litigants should be compensated," and therefore holds that *Falcone* precludes the award of attorney's fees in the instant case. However, a close reading of *Falcone* indicates that it did not explicitly reject the opportunity costs rationale. Instead, the *Falcone* court noted that "[a]lthough such a rule may negate the fear of inactive attorneys bringing FOIA claims solely to generate fees, it would produce difficult problems of proof. In any event, the rule is unsatisfactory because it does not address the other reasons which have led us to deny fees to *pro se* litigants." *Id.* That the opportunity costs rule does not address the first two concerns of the *Falcone* court is not a rejection of the argument.

The rationale of *Falcone* is inapplicable to section 1988 suits for attorney's fees. The purpose of section 1988 is to encourage lawyers "to search for violations of constitutional and statutory rights and then seek to vindicate those rights. . . ." *Duncan* v. *Poythress,* 777 F.2d 1508, 1515 (11th Cir. 1985), *cert. denied,* 475 U.S. 1129, 106 S. Ct. 1659, 90 L.Ed.2d 201 (1986). In contrast to the FOIA, section 1988 not only relieves the burden of litigation, but also rewards successful litigants for vindicating a constitutional right. Moreover, because the goal of section 1988 is to promote lawsuits that protect civil rights, the concern with "objective" lawsuits and a cottage industry of fee-generating lawyers is not as great as with the FOIA, where the litigation secures the release of individual documents from

the government. I do not challenge *Falcone*'s reading of the statutory purposes underlying the FOIA. However, I believe that these purposes are not present to the same extent, if at all, under section 1988. As such, I would allow Richard Kay, plaintiff-appellant, to recover attorney's fees equivalent to the opportunity cost of handling other litigation.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

Civil Action No. 88-3

RICHARD B. KAY, PLAINTIFF

v.

BREMER EHRLER, SECRETARY OF STATE, ET AL., DEFENDANTS

[Filed Jan. 19, 1989]

ORDER AND JUDGMENT

This matter is before the court on the Report and Recommendation of the United States Magistrate, and the court has considered *de novo* those objections filed thereto by plaintiff and defendants.

The court concludes that the Report and Recommendation of the Magistrate is correct in all respects and hereby adopts same. In addition, the court makes the following findings of fact and conclusions of law regarding plaintiff's and defendants' objections to the Magistrate's Report and Recommendation.

First, the plaintiff sought to have this court declare that the method by which members of the Board of Election are appointed is unconstitutional under Kentucky law. The Magistrate found that because this claim was based on Kentucky law, the court could only reach this claim by an exercise of pendent jurisdiction. He further found that the question was dominated by state law and was not necessarily tied to the other claims raised in the action. The Magistrate

recommended that this claim be dismissed because federal courts lack jurisdiction to enjoin state officials to act according to state law, even for claims brought under pendent jurisdiction. The plaintiff asks the court to certify the question of the constitutionality of the composition of the Board of Elections to the Kentucky Supreme Court.

This issue, however, is not one which is appropriate for certification. Certification is part of the abstention doctrine of the federal courts and is used when state law is unclear or difficult to ascertain. C. Wright, *Law of the Federal Courts* § 52 (4th ed. 1983). In *Lehman Brothers* v. *Schein,* 416 U.S. 386 (1974), the United States Supreme Court endorsed the use of certification to state court in cases where state law is unclear. It held that certification was appropriate "to resolve the controlling state law on which the federal rule may turn." *Id.* at 390. It also stated, "We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory." *Id.* at 390-91.

This case is not controlled by an unclear issue of state law. Rather, Kentucky law on the issue of the composition of the Board of Elections is explicit, and is contained in the Kentucky Constitution. Thus, the issue is not one which falls under the ruling of *Lehman Brothers*, where state law was difficult to ascertain and had not been interpreted by a state court. In *Lehman Brothers*, the Court held that abstention and certification were proper. In this case, because state law is not unclear, neither abstention nor certification are appropriate.

The Magistrate recommended dismissal of this claim because federal courts lack jurisdiction to enjoin state officials from acting according to state law. *Pennhurst State School & Hospital* v. *Halderman,* 465 U.S. 89, 119-24 (1984). In *Pennhurst*, the Court held that the Eleventh Amendment barred a federal court from ordering state officials to conform their conduct to state law. *Id.* at 106. In this suit, plaintiff seeks an injunction ordering state officials to act according to state constitutional law in the composition of the Elections Board.

Clearly, under the Court's holding in *Pennhurst*, such an injunction is barred by the Eleventh Amendment.

Because the court has no jurisdiction to adjudicate the issue of the composition of the State Board of Elections under Kentucky law, it has no authority to certify the question to the Kentucky Supreme Court. Certification is only appropriate when the federal court has jurisdiction over the matter. Plaintiff concedes that "this question should be determined by the Supreme Court of Kentucky instead of under the legal basis of pendent jurisdiction." Plaintiff's Memorandum with Regard to Magistrate's Report and Recommendation, Docket Number 58, at 1. Therefore, the court will dismiss the claim, and deny the plaintiff's motion to certify the issue to the Kentucky Supreme Court.

Second, defendants object to the Magistrate's recommendation that plaintiff be awarded litigation costs. Section 1988 of 42 U.S.C. provides: "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981–1983, 1985, 1986], . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The [M]agistrate found that becuase [sic] the plaintiff was the prevailing party, he was entitled to "litigation costs" under section 1988 for his claims against KRS § 18.581 and KRS § 118.611. The defendants do not disagree with the Magistrate, but contend that the litigation costs should include only the actual court costs, and not the costs incurred by the plaintiff in traveling to and from Kentucky to file pleadings which could have been filed by mail.

Generally, costs and expenses unnecessarily incurred by the prevailing party are not assessed against the unsuccessful party. *Vincennes Steel Corporation* v. *Miller*, 94 F.2d 347 (5th Cir. 1938). In *Vincennes*, the Fifth Circuit held that a prevailing party could recover the costs and expenses of its witnesses who attended trial, even when the witnesses were subpoenaed but

did not testify. It stated that "the liability of the losing party to his adversary is confined to expenses actually incurred and which were necessary to the prosecution or defense of the action." *Id.*

Items which courts have allowed as costs include postage, *Hancock* v. *Albee*, 11 F.R.D. 139 (D. Conn. 1951); fees for probate court copies, *Dysart* v. *Remington Rand, Inc.*, 15 F.R.D. 60 (D. Conn. 1952), *cert. denied*, 348 U.S. 861 (1954); investigation and litigation expenses, *Schauffler* v. *United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of U.S. and Canada, Local 420, AFL*, 148 F. Supp. 704 (E.D. Pa. 1956), *aff'd*, 246 F.2d 867 (3rd Cir. 1957); deposition expenses, *Concrete Mixing & Conveying Co.* v. *Great Western Power Co. of California*, 46 F.2d 331 (D. Cal. 1928), *appeal dism'd*, 48 F.2d 1072 (9th Cir. 1931); and fees and expenses of witnesses, *Donato* v. *Parker Pen Co.*, 7 F.R.D. 148 (S.D.N.Y. 1945); *Hansen* v. *City of Cordova*, 107 F. Supp. 594 (D. Alaska 1952). Items which federal courts have not allowed as costs include expenses incurred by a party in preparing for trial, *Hope Basket Co.* v. *Product Avancement Corp.*, 104 F. Supp. 444 (W.D. Mich. 1952); post office registration fees, *Department of Highways* v. *McWilliams Dredging Co.*, 10 F.R.D. 107 (W.D. La. 1950), *aff'd*, 187 F.2d 61 (5th Cir. 1951); costs incurred in using experts as consultants on technical matters, *Braun* v. *Hassenstein Steel Co.*, 23 F.R.D. 163 (D.S.D. 1959); and the cost of making copies which are not identified or used at trial, *Perlman* v. *Feldmann*, 116 F. Supp. 102 (D. Conn. 1953).

According to Rule 5 of the Federal Rules of Civil Procedure, filing of pleadings with the court and service on other attorneys may be done by mail. Personal filing is not required by either the Federal Rules or by the Joint Local Rules for the Eastern and Western Districts of Kentucky. Therefore, it was unnecessary for plaintiff to file his pleadings by any other method than mailing. Any expenses incurred in filing

pleadings with the court or with the defendants' attorneys by any method but mail were, consequently, unnecessary.

Plaintiff's expenses in traveling to Kentucky to file pleadings will not be allowed by the court. All other litigation expenses are granted.

Finally, plaintiff objects to the Magistrate's refusal to allow him attorney's fees. The Magistrate held that the plaintiff was not entitled to reasonable attorney's fees because he was a *pro se* litigant in the case. Plaintiff objects to this finding, and contends that attorney's fees for *pro se* litigants are proper and should be awarded. The Magistrate's analysis and conclusion on this issue is correct in all respects and the court hereby adopts same.

Therefore, for the above stated reasons,

IT IS ORDERED as follows:

1. That the objections to the Report and Recommendation of the United States Magistrate be, and they are, hereby overruled;

2. That the Report and Recommendation of the Magistrate, as supplemented by this Opinion, be, and it is, hereby adopted as the findings of fact and conclusions of law of the court;

3. That plaintiff's motion for summary judgment as to KRS § 118.581 be, and it is, hereby granted, and the said statute is declared to be unconstitutional;

4. That plaintiff's motion for summary judgment as to KRS § 118.611 be, and it is, hereby granted, and the said statute is declared to be unconstitutional;

5. That plaintiff's claim on the issue of the constitutionality of the composition of the Kentucky Board of Elections be, and it is, hereby dismissed due to lack of subject matter jurisdiction;

6. That plaintiff's motion to certify the fourth cause of action of plaintiff's complaint to the Supreme Court of Kentucky be, and it is, hereby denied;

7. That plaintiff be, and he is, hereby awarded costs herein consistent with this Report and Recommendation of the

Magistrate, as supplemented by this Opinion, but is denied attorney's fees herein; and

8. That defendants' motion for summary judgment be, and it is, hereby denied.

This 18th day of January, 1989.

WILLIAM O. BERTELSMAN, JUDGE

Copies w/notice of entry:
R. Kay
D. Ashley
Mag Hood
1/19/89
pm

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

Civil Action No. 88-3

RICHARD B. KAY, PLAINTIFF

v.

BREMER EHRLER, SECRETARY OF STATE, ET AL., DEFENDANTS

[Filed February 23, 1989]

ORDER

This matter is before the court on the motion of the plaintiff to amend the court's Judgment of January 19, 1989, to add a paragraph requiring return of the $1,000 deposited by plaintiff. No response having been filed thereto, the court assumes there is no opposition to this motion. Therefore, the court being advised,

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

1. That said motion be, and it is, hereby GRANTED;

2. That the Judgment of January 19, 1989, be amended to add the following paragraph:

> That the defendants herein are ordered to return forthwith to the plaintiff the $1,000 deposited by the plaintiff with the defendants pursuant to KRS 118.611.

This the 22d day of February, 1989.

/s/
WILLIAM O. BERTELSMAN, Judge

Copies:
Richard B. Kay
David Ashley
2/23/89—mhy

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FOR THE DISTRICT OF FRANKFORT

Civil Action No. 88-3

RICHARD B. KAY, PLAINTIFF

v.

BREMER EHRLER, SECRETARY OF STATE, ET AL., DEFENDANTS

[Filed Sep. 12, 1988]

MAGISTRATE'S REPORT AND RECOMMENDATION

This matter comes before the undersigned on cross-motions for summary judgment. The plaintiff, a Democratic candidate for president at the time this action arose, claims several parts of the Kentucky presidential preference primary system are violative of his rights under the United States Constitution. He brings this action under the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution; 42 U.S.C. Sections 1981, 1983, 1985, 1988, *et seq.*; 42 U.S.C. Section 1973; and 28 U.S.C. Sections 1331 and 1343.

The plaintiff announced his candidacy for president on August 10, 1987. In December, 1987, he wrote former Kentucky Secretary of State Drexel R. Davis asking that his name be presented to the Board of Elections at its January 8, 1988 meeting. On January 2, 1988, the plaintiff was notified of a Board of Elections decision in September, 1987, setting the criteria necessary for a candidate to satisfy KRS 118.581 which requires would-be candidates to be "generally advocated and nationally recognized" in order to be placed on

the ballot without gathering a petition. The Board decided a person who had received Federal Election Commission certification for matching funds would fullfill the statutory standard. The plaintiff did not so qualify and was told on January 11 that he had not been nominated to the ballot by the Board. On January 12, the plaintiff filed this action and asked for a temporary restraining order against the Board. Defendant's [sic], meanwhile, discovered the plaintiff had been placed on the Kentucky ballot in 1980, after bringing a lawsuit challenging a very similar statute. The court ordered theat [sic] he be placed on the ballot, holding the language of the statute void for vagueness. According to the defendants, upon discovery of plaintiff's previous candidacy and without knowledge of this complaint, the Board voted to nominate the plaintiff to the ballot. The plaintiff was notified of that action on January 13 and his name was, in fact, on the ballot in the May presidential preference primary. Several arguments are presented to this court by the parties['] motions for summary judgment and will be considered here individually.

I. MOOTNESS

The first argument which must be addressed is the defendants['] contention that the relief which the plaintiff seeks was awarded him and, thus, no controversy remains for this court. The plaintiff urges that this matter falls within the "capable of repetition, yet evading review" exception.

The primary is now over and the plaintiff's name did appear on the ballot. However, the constitutionality of the challenged election procedures remains in question. Even assuming the defendants placed the plaintiff's name on the ballot without knowlege [sic] of his lawsuit, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953). The laws in question remain on the books and the problem posed for voters and future candidates, including the plaintiff,

remains unsolved without action. *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n. 2 (1972).

A similar situation was presented to the Supreme Court in *Storer* v. *Brown*, 415 U.S. 724 (1974), where the Court noted that "[t]he 1972 election in [sic] long over, . . . but this case is not moot since the issues properly presented, and their effects . . . will persist as the . . . statutes are applied in future elections.["] *Id.* at 737. The plaintiff was faced with identical statutory language in 1980 and was forced to adjudicate its merit. Now, the controversy returns and plaintiff will be confronted with its terms so long as the statute involved remains. Therefore, the case is not moot.

II. KRS 118.581

The crux of the plaintiff's case concerns the constitutionality of KRS 118.581. The language challenged reads:

> [T]he board shall nominate as presidential preference primary candidates all those generally advocated and nationally recognized as candidates of the political parties for the office of President of the United States.

KRS 118.581 (1986).

As earlier noted, this exact statutory language was the subject of a lawsuit by the plaintiff in 1980. In *Kay* v. *Mills*, 490 F. Supp. 844 (E.D. Ky. 1980), the court declared this identical language unconstitutionally vague. In 1982, the Kentucky General Assembly repealed KRS 118.580. Then, in 1986, the General Assembly enacted KRS 118.581 as it is challenged here. The law has no greater constitutional support now than it did in 1980 and once again must be held unconstitutionally void for vagueness.

The right to be a candidate has been recognized as correlative to the right to vote and to cast a vote for the candidate of one's choice. The United States Supreme Court has said:

> Restrictions on access to the ballot burden two distinct and fundamental rights, 'the right of individuals to

> associate for the advancement of political beliefs, and the right of qualified voters ... to cast their votes effectively'.

Illinois State Board of Elections v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979) (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968)). Likewise, the interest of the state in the stability of its political system is not only permissible, but is compelling. *Storer*, 415 U.S. at 736. As with any other matter, the state's power to regulate is limited by the rights guaranteed under the Constitution. Legitimate state interests "must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity ...." *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974).

The standard of review enunciated in several decisions of the Court is one of strict scrutiny requiring statutes which burden access to be necessary to further a compelling state interest, and narrowly tailored to achieve that goal. *Bullock* v. *Carter*, 405 U.S. 134, 144 (1972); *Illinois State Board of Elections*, 440 U.S., at 184. Some procedures have been held to survive examination under this standard, indicating a more balanced test may be the true measure. *See Munro* v. *Socialist Workers Party*, 479 U.S. 189 (1986). Nonetheless, although the right of a candidate to ballot access may not necessarily be entitled to the rigorous standard of review given disenfranchisement cases, restrictions on that access must be justified by important state interests at a minimum. *Kay* v. *Austin*, 621 F.2d 809, 811 (6th Cir. 1980).

In light of these concepts, the reasoning of the court in *Mills* remains valid and the result in that case is dispositive of this issue. The facts and law can in no way be distinguished from the present case. In fact, the defendants make no attempt to do so. The flaw in the statute remains the same, i.e., a lack of criteria by which compliance with its language may be measured. The Board chose federal matching fund

qualification. It could just have easily made up any other criterion without offending the statute. As the *Mills* court noted, "[t]hose attempting to comply with it ... must necessarily guess at its meaning, and make important decisions based on such unavoidable guesswork." 490 F. Supp. at 852. The court found the major defect to be that "[n]o standards appear anywhere; no narrowly drawn limitations; no circumscribing of the absolute power ...." *Mills*, 490 F. Supp. at 853. This defect must be corrected in order for the statute to serve its purpose correctly. As was stated in *Mills*:

> This is not to say that national recognition is not a valid, rational basis for placing a candidate on a presidential ballot, or that a state administrative agency may not be vested with the power to decide what candidates have met such a standard. This court holds only that this discretion may not be uncontrolled.

490 F. Supp. at 853. For these reasons, the undersigned recommends that KRS 118.581 be declared unconstitutional and void for vagueness and that the defendants be permanently enjoined from enforcing the statute as it exists.

III. KRS 118.611

The plaintiff next contends that KRS 118.611 pertaining to filing fees for candidates on the ballot is discriminatory in its application violating the equal protection and due process clauses of the Constitution. The statute, enacted in 1986 with the previously discussed provision, requires a $1,000 deposit from candidates who are nominated for the ballot in presidential preference primaries. The plaintiff objects to the second part of the statute which reads:

> (2) If the candidate fails to receive three percent (3%) or more of the total popular vote cast in the presidential preference primary of his party, the one thousand dollars ($1,000) deposit shall escheat to the Commonwealth and be placed in a special trust and

> agency fund to be used by the secretary of state to defray election expenses.

KRS 118.611 (1986).

This provision in effect imposes a filing fee which all candidates must pay before they may appear on the ballot. The plaintiff does not seriously argue that a state may not constitutionally require a filing fee. Moreover, it is clear by the Supreme Court's specific ruling in *Bullock*, 405 U.S. 134 (1972), that filing fees do not, in general, violate the constitutional rights of those who seek to become candidates.

The impact of the fee refund is apparently a question of first impression in the federal courts. The plaintiff argues the provision is discriminatory because its effect is to penalize minority candidates who do not receive the required votes, while major candidates are in reality not required to pay any fee. The defendants point to an important interest in defraying the cost of the election, contending that the state is unwilling to bear the total expense for candidates with no opportunity to win. They also urge the commonly cited policies of protecting the election process from nonserious candidates, creating managable [sic] ballots, and avoiding voter confusian.

As noted earlier, the statute must be carefully scrutinized and balanced against any infringement upon voting and the right of association. While perfect equality is not required, the state must have some compelling interest for any burden placed on minority candidates. *Williams*, 393 U.S. at 31. The interests of the defendants are clearly among those which have been held sufficient to outweigh the candidate's right to ballot access in certain cases. *See Bullock*, 405 U.S. at 145; *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

The burden imposed by this statute and the interests purported to be served by it do not match in this case. In reality, the effect of this provision is to impose fees only on minority candidates. If the statute expressly required this result, it would undoubtedly be unconstitutional. The conclusion is no different when state tries to do indirectly what

cannot be accomplished directly. The statute, in a sense, punishes candidates for not getting enough votes. Any state interest in uncluttered ballots and serious candidates must be satisfied *before* the candidate gets on the ballot. Here, the impact of the restriction continues after the state interest ceases. Although the candidate's access has been granted, it is burdened with proof of support at the ballot box. If the required support[1] does not materialize, then the candidate is forced to pay for the exercise of his rights while other candidates are not so compelled.

The courts have recognized only that states have an interest in a *preliminary* showing of support by the candidate before gaining access to the ballot. *Illinois State Board of Elections*, 440 U.S. at 185. Once that access has been granted, no interest has been recognized which allows the state to come back and place a penalty on a few of the candidates. The defendants' contention that the refund system helps defray the costs of the primary is not logical. That interest is obviously better served by a non-refundable fee, which at the same time would avoid the imposition of a discriminatory burden.

The defendants also argue that the Eleventh Amendment bars any relief for the plaintiff on this issue. The plaintiff seeks the return of his deposit and a permanent injunction against enforcement of the statute. The Eleventh Amendment does not ordinarily bar federal courts from requiring state officers to comply with federal injunctions. *Ex parte Young*, 209 U.S. 123 (1908); *see also Mills*, 409 F. Supp. at 847. It is true that monetary judgments against the state's coffers are generally barred by the amendment. *Id.* However, this case is obviously distinguishable because the money the plaintiff seeks is his own. Under the terms of the statute, it is merely a "deposit" the return of which will not come from the state treasury. Interest on the deposit sought by the plaintiff is not provided

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1. There is no indication why three percent of the popular vote is the required support level. Though this cutoff point appears somewhat arbitrary, the plaintiff does not raise the issue.

for by the statute, therefore that relief cannot be granted as it would be barred by the Eleventh Amendment.

The undersigned recommends that KRS 118.611 be held unconstitutional as violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution, that the defendants be permanently enjoined from enforcing the statute, and that the plaintiff's $1,000 deposit be returned.

IV. Composition of the State Election Board

The plaintiff's fourth cause of action seeks to have this court declare the method by which members of the Board of Election are appointed unconstitutional under Kentucky law. He does not make any claim of unconstitutionality under the United States Constitution, nor does he raise any other federal question in relation to this issue. The only support cited by the plaintiff is a Kentucky case and an opinion of the Kentucky Attorney General.

This court could only reach this claim by an exercise of pendent jurisdiction, though the plaintiff does not specifically argue the invocation of such authority. The question here is one particularly dominated by state law and is not necessarily tied to the other claims raised in this action. The Supreme Court said in the landmark case of *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966):

> [I]f it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.

Id. at 725.

The Supreme Court has clearly ruled that federal courts lack jurisdiction to enjoin state officials to act according to state law, even for claims brought under pendent jurisdiction. *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 119-24 (1984). Therefore, the undersigned recommends

that this claim be dismissed due to lack of subject-matter jurisdiction. [A]ttorney fees and costs sought by the plaintiff on this issue cannot be granted due to the lack of jurisdiction.

V. Costs and Attorney Fees

The final issue to address is plaintiff's claim for costs and attorney fees under 42 U.S.C. Section 1988 as a result of this action. The defendants again raise the Eleventh Amendment as a defense, asserting that the imposition of costs and attorney fees is a monetary judgment against the state prohibited by the amendment. Although a federal court may not directly order a state to act, state officials can be enjoined by the federal court from unconstitutional acts. *Ex parte Young*, 209 U.S. at 156. "In an injunctive action grounded on federal law, the state's immunity can be overcome by naming state officials as defendants. Monetary relief that is 'ancillary' to injunctive relief also is not barred by the eleventh amendment." *Kentucky* v. *Graham*, 473 U.S. 159, 169 n. 18 (1985) (citation omitted).

The defendants here are all named in their official capacity and, as such, are not entitled to Eleventh Amendment immunity in section 1983 suits for costs and attorney fees.

The plaintiff is an attorney proceeding *pro se* in this matter, raising another question as to his entitlement to attorney fees under section 1988. Jurisdictions are split on this issue. Compare *Duncan* v. *Poythress*, 777 F.2d 1508 (11th Cir. 1985) (attorney litigants are entitled to fees) with *Lawrence* v. *Staats*, 586 F. Supp. 1375 (D.D.C. 1984) (attorney-plaintiff not entitled to fees).

The Sixth Circuit has held that non-attorney *pro se* litigants are not entitled to attorney fees under section 1988. *Wright* v. *Crowell*, 674 F.2d 521 (6th Cir. 1982). In an analogous case, a panel of the Sixth Circuit held that attorney *pro se* litigants under the Freedom of Information Act are not entitled to fees. *Falcone* v. *Internal Revenue Service*, 714 F.2d 646 (6th Cir. 1983), *cert. denied* 466 U.S. 908, 104 S.Ct. 1689 (1984). The

reasoning was much the same as is argued under section 1988. The court based its ruling on the fact that the fees are intended as compensation for legal costs actually incurred and said that no such costs are incurred by attorney litigants. The court also stated that payment of fees encourages claimants to seek legal advice. *Pro se* attorneys are "unlikely to have the 'detached and objective perspective' necessary to fulfill the aims of the Act." *Id.* at 647. Finally, the court stated, "[w]e do not believe that Congress intended to so subsidize attorneys without clients." *Id.* at 648 (footnote omitted). Thus, it is unlikely the Sixth Circuit would reach a different conclusion on this issue specifically under section 1988 unless it chooses to somehow distinguish the application of the reasoning in *Falcone.*

Accordingly, the undersigned recommends that the plaintiff be awarded litigation costs under section 1988 for his claims against KRS 118.581 and KRS 118.611, however no costs may be awarded for that part of this action over which the court has no jurisdiction. Under Sixth Circuit authority, the plaintiff is not entitled to attorney fees.

Particularized objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same or further appeal is waived. *Thomas* v. *Arn*, 728 F.2d 813 (6th Cir. 1984), *aff'd*, 474 U.S. 140 (1985); *Wright* v. *Holbrook*, 794 F.2d 1152, 1154-55 (6th Cir. 1986). A party may file a response to another party's objections after being served with a copy thereof. Rule 72(b), Fed.R.Civ.P.

This the 12th day of September, 1988.

/s/
JOSEPH M. HOOD
United States Magistrate

Date of Entry and Service:
Richard Kay
David Ashley
9-13-88

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-5297

RICHARD B. KAY, PLAINTIFF-APPELLANT,

v.

BREMER EHRLER, AND THE KENTUCKY BOARD OF ELECTIONS, DEFENDANTS-APPELLEES.

[Filed April 13, 1990]

JUDGMENT

Before: JONES and MILBURN, Circuit Judges; and BELL, District Judge.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/
Clerk

A True Copy.

Attest:

/s/
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Richard B. Kay
1080 E. Indiantown Road
Jupiter, FL 33477

May 16, 1990

RE: 89-5297
Kay vs. Ehrler
District Court No. 88-00003

Dear Counsel:

This letter is to advise that your motion to extend the time for filing a petition for rehearing has been denied.

Very truly yours,
Leonard Green, Clerk

(Mrs.) Yvonne Henderson
Deputy Clerk

cc: David Ashley

(7)

No. 96-78

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

RICHARD E. RAY Petitioner

versus

[illegible], AND THE
[illegible] BOARD OF ELECTIONS Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI

FREDERIC J. COWAN
ATTORNEY GENERAL

DAVID M. ASHLEY
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601
(502) 564-5911

Counsel for Respondent

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether an attorney representing himself is entitled to an award of fees under 42 U.S.C. Section 1988.

PARTIES TO THE PROCEEDINGS

There are no petitioners or respondents in addition to those named in the caption.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-79

RICHARD B. KAY — Petitioner

versus

BREMER EHRLER AND THE KENTUCKY BOARD OF ELECTIONS — Respondent

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents, Bremer Ehrler, and the members of the Kentucky State Board of Elections respectfully request that the Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 900 F.2d 967. The Opinion in its entirety is contained in the petition at Appendix la-lla.

JURISDICTION

Petitioner relies on 28 U.S.C. Section 1254(1) to invoke jurisdiction.

STATUTE INVOLVED

42 U.S.C. Section 1988, as amended by the 1976 Civil Rights Attorney's Fees Awards Act, provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

Petitioner, representing himself, filed his original complaint in the United States District Court for the Eastern District of Kentucky in January of 1988. Concurrent with filing the complaint, petitioner filed a motion for a temporary restraining order and/or preliminary injunction challenging the constitutionality of Ky. Rev. Stat. Section 118.581 and Ky. Rev. Stat. Section 118.611 and requested that his name be placed on the ballot for the Kentucky May primary election as a candidate for President of the United States. The original complaint alleged that the Kentucky presidential preference primary election laws which required that the State Board of Elections shall caused to be placed upon the ballot only those "generally advocated and nationally recognized" presidential candidates. The Kentucky State Board of Elections had previously decided that those persons who had received

Federal Election Committee certification for matching funds shall fulfill the statutory standard. The petitioner did not so qualify and was advised by the Kentucky State Board of Elections that he would not be nominated to the ballot and certified by the Board. Immediately thereafter, petitioner filed this action, alleging in the original complaint that the actions of the Secretary of State and the State Board of Elections were violative of his rights under the First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; 42 U.S.C. Sections 1981, 1983, 1988, et seq; 42 U.S.C. Section 1973; and 28 U.S.C. Sections 1331 and 1343.

In 1980, petitioner had brought suit in Kentucky challenging the validity of what was then essentially the same statute as was questioned in the present litigation, and as a result his name was placed upon the 1980 presidential election ballot in Kentucky.

Kay v. Mills, 490 F.Supp. 844 (E.D. Ky. 1980). In 1982, the Kentucky General Assembly repealed this statute, Ky. Rev. Stat. Section 118.580. In 1986, the Kentucky General Assembly, enacted Ky. Rev. Stat. Section 118.581, which is the subject of the present challenge. In January 1988, the Kentucky State Board of Elections, without knowledge of the suit filed at that time, and upon knowledge of petitioner's previous candidacy voted to place Kay's name on the presidential preference primary ballot. By the action taken by the Kentucky State Board of Elections, petitioner's request for a temporary restraining order and preliminary injunction were rendered moot. However, upon the adoption of the Magistrate's Report and Recommendation as same appears at 19a of the Appendix filed by petitioner, and by adoption of it by the District Court, as same appears at page 18a of the Appendix filed by petitioner, the District Court declared the provisions of Ky. Rev. Stat.

Section 118.581 and Ky. Rev. Stat. Section 118.611 unconstitutional. The court found that the statutes did not contain a reasonable criteria by which candidates could measure their qualifications for being an independent presidential candidate, and that the requirement imposed by Ky. Rev. Stat. Section 118.611, which, in essence required all candidates to provide a $1,000 deposit with the filing of the petition, but which allows refund of the deposit to candidates of a major political party was violative of the Equal Protection and Due Process Clauses of the Constitution. The District Court held, that the impact of the fee refund system was clearly discriminatory. The net effect was to penalize minority candidates, while allowing majority political party candidates to pay no filing fee.

The only question left unresolved by the District Court decision was the question of the "costs of litigation" and the present question of attorney's fees. The District Court allowed the petitioner to recover his costs of litigation. This issue is addressed at page 27a of the Appendix filed by the petitioner.

The District Court's opinion and the opinion of the Sixth Circuit, affirming the lower court's decision denied an award of attorney fees to petitioner under the rationale from a previous case of the Sixth Circuit which held that a pro se attorney was ineligible for attorney fees in an action under the Freedom of Information Act. 5 U.S.C. Section 552(a)(4)(E). Falcone v. Internal Revenue Service, 714 F.2d 646 (6th Cir. 1983), cert. denied, 466 U.S. 908 (1984).

Respondents respectively urge that the Court deny petitioner's request for a writ of certiorari in this case. While it is apparent that the several circuits are divided upon the issue of an award of attorney fees pursuant to 42 U.S.C. Section 1988, respondents do not believe that the factual circumstances of this case are such as to warrant a decision of this Court upon the question. Richard Kay is a practicing attorney, residing in and licensed to practice in the State of Florida. He has sought to be a presidential candidate appearing on the Democratic Party primary ballot in Kentucky and many other states. See Kay v. Austin, 621 F.2d 809 (6th Cir. 1980); Kay v. Mills, supra. Respondents urge that the reasoning of the Sixth Circuit, as set forth in Falcone, supra, is particularly applicable to the case and should not be overturned. The very narrow state of

facts in this case is such that it should not lend itself to a wide-sweeping interpretation of a proper award of attorney fees under 42 U.S.C. Section 1988.

It is well settled that in a majority of the circuits that non-attorney plaintiffs who proceed pro se and prevail in civil rights actions cannot recover attorney's fees. 42 U.S.C. Section 1988. Gonzales v. Kangas, 814 F.2d 1411 (9th Cir. 1987); Walje v. City of Winchester, 827 F.2d 10 (6th Cir. 1987). The circuits have split, quite widely, on the question of whether an award of attorney fees is appropriate when the pro se civil rights plaintiff was also an attorney. Perhaps the most prominent case in which the court has found that such an award is proper. Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985), cert. denied, 475 U.S. 1129. Those cases in which the court has denied an award of attorney fees in the most part have been decided in cases

involving the Freedom of Information Act, 5 U.S.C. Section 552(a)(4)(E). Falcone, supra, Aronson v. United States, Dep't of Housing and Urban Dev., 866 F.2d 1 (1st Cir. 1989). The reasoning, as expressed in the case of Falcone, supra, is that 42 U.S.C. Section 1988 presupposes an attorney/client relationship. It is submitted that this is the correct interpretation in that while Falcone, supra, and other cases decided under the Freedom of Information Act, do not involve quite the same issues as cases brought pursuant to 42 U.S.C. Section 1983, that the reasoning of an attorney/client relationship should apply. The intent of an award of fees under 42 U.S.C. Section 1988 should be to compensate litigants for legal costs actually incurred. No such costs are incurred by attorney litigants. The court in Falcone, supra, corectly stated that ". . . [W]e do not believe that Congress intended to so subsidize attorneys without clients." Id. at 648.

It is submitted that petitioner has voluntarily chosen to become a presidential candidate on numerous occasions, and has been precluded from being so, or at least thwarted from being a candidate by the State of Kentucky and others. He has, in effect, created his own client base. Petitioner self-generates his own litigation. Respondents respectfully submit that the lower court has correctly assessed this situation, when, in effect, it concluded that the petitioner has not incurred any expenses for legal representation, and that the only possible loss would had been from the time he might have billed to other clients, assuming there were other clients to be billed. There has been no showing of any actual pecuniary losses in this case at all. Petitioner, by virtue of the decision of the District Court, has been awarded all actual costs of litigation except attorney fees.

Respondents argue that to award petitioner "opportunity costs" would be most inappropriate, particularly upon the factual circumstances of this case. This is not exactly the case in which a successful litigant has been represented by a pro se lawyer representing a person or a class of persons whose situation involves a broad deprivation of civil rights, nor is it a situation involving public interest organizations or other organizations whose in-house counsel brings civil rights actions. The narrowness of the issue and facts involved in this case does not make it a proper one upon which to base a wide reaching interpretation of the award of attorney fees under 42 U.S.C. Section 1988.

In addition to the foregoing reasoning, respondents submit that the bulk of the relief which petitioner sought was obtained with very little effort on his part. It is apparent that once the Kentucky Board of Elections realized

that the candidate was the same candidate who had successfully litigated this same question in 1980, his name was immediately placed on the ballot. Kay v. Mills, supra. The ensuing litigation has basically involved the question of attorneys fees. It is generally well settled that civil right plaintiffs are considered "prevailing" even if at all partially successful, so long as if they are successful on any significant issue in litigation which achieved some of the benefits the party sought in bringing the suit. Plaintiffs may "prevail" even when the benefit sought is achieved through the defendants voluntary compliance if the suit was the "catalyst" that brought about compliance by the defendants. Williams v. Miller, 620 F.2d 199 (8th Cir. 1980), Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), Hanrahan v. Hampton, 446 U.S. 754 (1980). However it is submitted that Kay would have had his name on the ballot had he done nothing at all.

Lastly, respondents' state that an award of fees under 42 U.S.C. Section 1988 is, and always has been, subject to judicial discretion. Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719 (1980); Criterion Club v. Board of Commissioners, 594 F.2d 118 (5th Cir. 1979). Petitioner's orginal request for a temporary injunction and restraining order was rendered moot by the actions of the Kentucky Board of Elections. All of the results which petitioner originally sought were achieved. As stated previously, the ensuing litigation and appeal has essentially involved only the question of attorney's fees. It is strongly urged that an award of fees in this case would be highly inappropriate, and not at all an action contemplated by 42 U.S.C. Section 1988. It is further submitted that this is the case in which the pro se attorney has become his own best

client. The ruling of the court below, based on its decision in Falcone, supra, is indeed most proper.

Respondent further state that Petitioner should not be awarded attorney fees simply because he had previously litigated the same question in 1980. 42 U.S.C. Section 1988 comtemplates an award of attorney fees as reimbursement for costs actually incurred to a successful civil rights litigant. No where can it be found that attorney fees are to be awarded as penalties or sanctions.

CONCLUSION

The petition for a writ of certiorari should be DENIED.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD B. KAY,

Petitioner,

v.

BREMER EHRLER AND THE KENTUCKY BOARD OF ELECTIONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

In opposing certiorari, respondents concede that "[t]he circuits have split, quite widely, on the question of whether an award of attorney fees is appropriate when the pro se civil rights plaintiff [is] also an attorney" (Opp. 9). They also do not dispute petitioner's statement (Pet. 9) that the issue is one of great importance. Instead, they claim that "the factual circumstances of this case are [not] such as to warrant a decision of this Court upon the question" (Opp. 8).

In this respect, respondents appear to suggest that recovery is not appropriate here because "[t]here has been no showing of any actual pecuniary losses" and because this is not "a situation involv[ing] a broad deprivation of civil rights" (Opp. 11-12). The first point is irrelevant; the second is both irrelevant and factually inaccurate (since, as the magistrate noted (Pet. App. 20a), petitioner's suit benefited "voters and future candidates"). In any event, none of the conflicting decisions in this area has suggested that the right to recover

fees under Section 1988 can or should depend upon such particularized factual inquiries.[1]

Respondents do not dispute that petitioner is a pro se attorney (Opp. 3, 8); that he prevailed in his constitutional challenge to Ky. Rev. Stat. §§ 118.581 and 118.611 (Opp. 5-6); and that this case squarely presents the question of whether a pro se attorney may recover attorney's fees under Section 1988.[2] This case is thus an appropriate vehicle for deciding the purely legal issue of whether a prevailing pro se attorney is entitled to attorney's fees under Section 1988, a question that has sharply divided the circuits and that only this Court can resolve.

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

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SEPTEMBER 19, 1990

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[1] Respondents likewise err in suggesting that petitioner is seeking fees "because he had previously litigated the same question in 1980" (Opp. 15). In fact, petitioner is seeking fees only for the lawsuit that he commenced in January of 1988 (*see* Pet. App. 27a).

[2] Respondents note that an award of attorney's fees under 42 U.S.C. § 1988 "is, and always has been, subject to judicial discretion" (Opp. 14). This point is similarly irrelevant. As respondents' own authorities make clear, a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737-38 n.17 (1980) (citations omitted); *Criterion Club of Albany v. Board of Commissioners*, 594 F.2d 118, 120 (5th Cir. 1979). The courts below did not rely upon any "special circumstances" in denying petitioner's fee request. Instead, they concluded that pro se attorneys are prohibited as a matter of law from recovering attorney's fees. *See* Pet. App. 8a-9a, 16a, 27a-28a.

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a losing defendant may avoid the payment of attorney's fees under 42 U.S.C. § 1988 solely because the action was brought by an attorney who represented himself.

PARTIES TO THE PROCEEDINGS

There are no petitioners or respondents in addition to those named in the caption.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-79

RICHARD B. KAY,
Petitioner,
v.
BREMER EHRLER AND THE KENTUCKY BOARD OF ELECTIONS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 900 F.2d 967. The opinion of the district court (Pet. App. 12a-17a) and the report and recommendation of the magistrate (Pet. App. 19a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1990. Pet. App. 29a. The petition for a writ of certiorari was filed on July 11, 1990, and was granted on October 1, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The 1976 Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

Petitioner, an attorney, brought a federal lawsuit on his own behalf in January, 1988 challenging the constitutionality of various Kentucky statutes governing the Commonwealth's presidential primaries. Approximately one year later, the district court granted summary judgment in petitioner's favor on virtually all of his substantive claims. Nonetheless, the court denied petitioner's request for attorney's fees under the 1976 Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, on the ground that an attorney who represents himself is ineligible for such fees. Pet. App. 16a. In a split decision, the court of appeals affirmed the denial of attorney's fees. *Id.* at 1a-11a.

The present lawsuit is actually petitioner's second challenge to the constitutionality of Kentucky's presidential primary statutes. Petitioner, a resident of Florida, has on more than one occasion run as a candidate for the office of President. Early in 1980, petitioner notified the Kentucky Board of Elections (the "Board") that he wished to appear on the Kentucky Democratic presidential primary ballot pursuant to Ky. Rev. Stat. § 118.580 (repealed in 1982). That statute provided that the Board shall nominate and place on the ballot presidential primary candidates, but it limited that opportunity, for those not qualifying by petition, to "all those [who are] generally advocated and nationally recognized" presidential candidates. On April 2, 1980, the Board met to select names

for the presidential primary ballot. At that meeting it determined that petitioner should not be placed on the ballot. Twelve days later, petitioner, acting pro se, filed suit in federal district court, alleging that Ky. Rev. Stat. § 118.580 was unconstitutional because of its "potential for discriminatory treatment of persons such as the [petitioner]." *Kay v. Mills*, 490 F. Supp. 844, 850 (E.D. Ky. 1980).

On April 23, 1980, the district court entered a preliminary injunction prohibiting the printing or distribution of Kentucky Democratic primary ballots that did not include petitioner's name. Nine days later, the court issued an opinion holding the statute unconstitutional. *Kay v. Mills*, *supra*. As a remedy, the court ordered that petitioner's name be placed on the ballot. 490 F. Supp. at 854-55. Although petitioner was the prevailing party and handled the case pro se, he did not seek attorney's fees.

In 1982, two years after the district court rendered its decision, the Kentucky General Assembly repealed Ky. Rev. Stat. § 118.580. In 1986, however, it adopted an identically worded statute: Ky. Rev. Stat. § 118.581. Pet. App. 21a.

On August 10, 1987, petitioner announced that he would again run for President. Four months later, he wrote to the Kentucky Secretary of State,[1] requesting that his name be presented to the Board for a decision on whether his name should be placed on the primary ballot. On January 11, 1988, petitioner was notified that because he was not a "nationally recognized" candidate, his name would not appear on the ballot. Pet. App. 20a. This was essentially the same ground on which petitioner was denied access to the ballot in 1980, and which the district court had found to be unconstitutional.

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[1] At the time, the Secretary of State was Drexel Davis. Davis was later succeeded by respondent Bremer Ehrler. Pet. App. 2a & n.1.

The following day, petitioner, again appearing pro se, filed the present lawsuit under the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution and under 42 U.S.C. §§ 1981, 1983, 1985, and 1988. He requested that Ky. Rev. Stat. § 118.581 be declared unconstitutional; that his name be placed on the ballot for the Commonwealth's presidential preference primary scheduled for March 8, 1988; that his "candidates' deposit" of $1,000 be refunded; and that the Kentucky statute governing candidates' deposits—Ky. Rev. Stat. § 118.611—be declared unconstitutional on the ground that it discriminated against candidates who do not receive a certain percentage of total votes.[2] Pet. App. 1a-2a. On January 13, 1988, respondents—having ascertained that petitioner was the same person who had successfully filed suit in 1980—notified petitioner that his name had in fact been placed on the ballot. Pet. App. 20a.

Subsequently, both petitioner and respondents moved for summary judgment on petitioner's remaining claims. Pet. App. 2a. The district court referred the matter to a magistrate, who filed a report on September 13, 1988. Pet. App. 19a-28a. In his report, the magistrate stated that petitioner's lawsuit was not moot—even though the election was over and petitioner's name had appeared on the ballot—because "[t]he laws in question remain on the books and the problem posed for voters and future candidates, including [petitioner], remains unsolved without action." Pet. App. 20a-21a (citation omitted). Relying on *Kay v. Mills*, the magistrate recommended that Ky. Rev. Stat. § 118.581 be declared unconstitutional. He noted that "[t]he law has no greater

[2] Ky. Rev. Stat. § 118.611 provided that if a candidate failed to receive three percent of the vote cast in his party's primary, the $1,000 candidates' deposit would "escheat to the Commonwealth and be placed in a special trust and agency fund to be used by the secretary of state to defray election expenses."

constitutional support now than it did in 1980 . . . ." Pet. App. 21a. Regarding the candidates' deposit statute, the magistrate found that Ky. Rev. Stat. § 118.611 violated the Due Process and Equal Protection Clauses because it "impose[d] fees only on minority candidates." Pet. App. 24a.

Although the magistrate stated that petitioner should be awarded "litigation costs" under 42 U.S.C. § 1988, he recommended that petitioner be denied his request for attorney's fees under that statute. The magistrate reasoned that the latter issue was controlled by the Sixth Circuit's decision in *Falcone v. IRS*, 714 F.2d 646 (6th Cir. 1983), *cert. denied*, 466 U.S. 908 (1984), which held that a pro se attorney was ineligible for attorney's fees in an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E). Pet. App. 27a-28a.

Both petitioner and respondents filed objections to the magistrate's report. The district court, after considering the objections de novo, concluded that the magistrate's recommendations were "correct in all respects" and thus adopted them as its own. Pet. App. 12a. The court thus held that both Ky. Rev. Stat. § 118.581 and Ky. Rev. Stat. § 118.611 were unconstitutional. On the issue of attorney's fees, the court summarily rejected petitioner's argument, noting simply that the magistrate had correctly analyzed the issue. Pet. App. 16a.

Petitioner appealed the denial of attorney's fees, and a divided panel of the Sixth Circuit affirmed. Pet. App. 1a-11a. The court acknowledged at the outset that while most circuits had denied attorney's fees under 42 U.S.C. § 1988 to nonlawyers appearing pro se, "courts have seen quite a different issue when the pro se civil rights plaintiff was also an attorney." Pet. App. 5a. The court noted that the cases were divided, with most courts concluding that a pro se attorney is entitled to attorney's fees under 42 U.S.C. § 1988. Pet. App. 5a-6a & n.2.

The court pointed out that several courts addressing the issue had looked for guidance to attorney's fees case law under the FOIA. Pet. App. 6a-7a. In that context as well, the court acknowledged, the decisions were divided. Pet. App. 7a. Nonetheless, since the Sixth Circuit, in *Falcone v. IRS*, had specifically held that pro se attorneys could not recover fees in the FOIA context, the court felt bound to follow that decision in the section 1988 context. Pet. App. 7a-9a.

Following its reasoning in *Falcone*, the court concluded that section 1988 "assumes a paying relationship between an attorney and a client." Pet. App. 8a. The court also stated that under *Falcone*, attorney's fees should not be allowed for a variety of policy reasons. Specifically, the court held fees should be denied because attorneys who handle their own cases cannot screen them objectively to eliminate meritless ones; because pro se attorneys do not suffer any "actual pecuniary losses for which [they] should be compensated"; and because of the risk of creating a "cottage industry" of inactive lawyers filing pro se civil rights cases. Pet. App. 7a (citing 714 F.2d at 647-48).

Judge Jones dissented. Pet. App. 9a-11a. While he "[did] not challenge *Falcone's* reading of the statutory purposes underlying the FOIA," he stated that "the concern [raised in *Falcone*] with 'objective' lawsuits and a cottage industry of fee-generating lawyers is not as great [under section 1988]." Pet. App. 10a-11a.[3]

[3] On May 16, 1990, the Sixth Circuit denied petitioner's motion for extension of time for filing a petition for rehearing. Pet. App. 30a.

SUMMARY OF ARGUMENT

Section 1988's language establishes three conditions that must be satisfied before the courts have authority to award attorney's fees: the party seeking fees must be the "prevailing party"; the amount sought must be "reasonable"; and the service must have been provided by an "attorney." Here, there is no dispute with respect to these three conditions. Petitioner unquestionably prevailed, and the reasonableness of his fees is not at issue. Similarly, the courts below recognized that petitioner is a licensed attorney. Pet. App. 3a, 16a, 27a. Petitioner therefore has done all that the statute requires for an award of attorney's fees.

Given the straightforward structure of section 1988, and the direct manner in which pro se attorneys, such as petitioner, satisfy the statute's conditions, it is hardly surprising that the vast majority of courts to address the issue have concluded that pro se attorneys are eligible for a section 1988 fee award. The court of appeals below, however, has chosen to reject these authorities and construed the statutory text to require a paying attorney-client relationship. In offering this interpretation, the court below has ignored *Blum v. Stenson*, 465 U.S. 886 (1984), where the Court held section 1988 did not premise eligibility for fees on such a relationship. Similarly, the court below ignored this Court's directive in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam), that the fee-shifting provisions of the 1964 Civil Rights Act—provisions upon which section 1988 was modeled—are to be construed broadly, allowing fees unless special circumstances would render the award unjust. No such special circumstances are presented here.

The legislative history of section 1988 confirms that pro se attorneys are eligible for a fee award. Section 1988 was drafted in direct response to *Alyeska Pipeline Serv. Corp. v. Wilderness Soc'y*, 421 U.S. 240 (1975), in which the Court held that federal courts had no power to award

fees absent specific Congressional authorization. The parties seeking fees in *Alyeska* included organizations proceeding on their own behalf, litigants indistinguishable from pro se attorneys. In providing the necessary authority for fee-shifting in the civil rights context, Congress expressly noted that pro se organizations, such as those involved in *Alyeska*, were eligible for a fee award. H. R. Rep. No. 1558, 94th Cong., 2d Sess., 8 n.16 (1976). Pro se attorneys, such as petitioner, are indistinguishable from organizations litigating on their own behalf. And any effort to distinguish between pro se attorneys and pro se organizations would enmesh the courts in repeated litigation. Nothing in the legislative history suggests Congress intended such a case-by-case assessment of the eligibility for fees.

Finally, denying fees to pro se attorneys is inconsistent with Congress' strong policy in favor of vigorous private enforcement of the civil rights laws. The legislative history indicates that Congress intended to rely heavily on private enforcement efforts, like those of petitioner in this case, to vindicate the rights ensured by the civil rights laws. Congress viewed broad availability of fee awards as an important mechanism to encourage such enforcement. By denying fees to pro se attorneys, the court below undermined that statutory scheme. To allow full and effective enforcement of the civil rights laws, the decision below must be reversed.

ARGUMENT

I. THE LANGUAGE OF SECTION 1988 REQUIRES AN AWARD OF ATTORNEY'S FEES FOR PREVAILING PRO SE ATTORNEYS IN CIVIL RIGHTS CASES

As the court below acknowledged (Pet. App. 5a), the great weight of authority holds that pro se attorneys, such as petitioner, are entitled to fees under section 1988. *See, e.g., Duncan v. Poythress*, 777 F.2d 1508 (11th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1129 (1986); *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980); *Shakman v. Democratic Org. of Cook Cty.*, 634 F. Supp. 895 (N.D. Ill. 1986); *Lanasa v. City of New Orleans*, 619 F. Supp. 39 (E.D. La. 1985); *Rybicki v. State Bd. of Elections*, 584 F. Supp. 849 (N.D. Ill. 1984) (three judge court). As one court succintly stated, "[a] litigant does not lose his entitlements as an attorney merely by virtue of his self representation." *Jones v. Lujan*, 883 F.2d 1031, 1035 (D.C. Cir. 1989).

The language of section 1988 requires that result. That section provides, in relevant part, that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. This language establishes three conditions that must be satisfied before the court has discretion to award attorney's fees: the party seeking the fees must have prevailed; the fees claimed must be reasonable; and the service must have been provided by an attorney.[4]

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[4] Some courts and commentators have read the term "attorney" more generically, as anyone who performs legal services, including pro se non-attorneys, and have taken the position that non-attorneys are entitled to "a reasonable attorney's fee." *See, e.g., Cox v. Department of Justice*, 601 F.2d 1, 5-6 (D.C. Cir. 1979); Note, *Awarding Attorney's Fees to Prevailing Pro Se Litigants*, 80 Mich. L. Rev. 1111 (1982); Note, *To Fee, or Not to Fee: The Dilemma of the Pro Se Attorney In Collecting Attorney's Fees*, 16 W.St.

There is no dispute that petitioner is the "prevailing party," since the district court accepted his position and struck down both Ky. Rev. Stat. § 118.581 and Ky. Rev. Stat. § 118.611 as unconstitutional. The reasonableness of petitioner's fees is not at issue. Finally, there is no dispute that petitioner qualifies as an "attorney." The court of appeals expressly recognized (Pet. App. 3a) his status as "a licensed attorney," as did the magistrate (Pet. App. 27a), whose views were accepted by the district court (Pet. App. 16a). Petitioner therefore has done all that the statute requires for an award of attorney's fees. *See, e.g., Jones*, 883 F.2d at 1034-35 (noting that language of Equal Access to Justice Act compels a fee award for a pro se attorney "because he was represented by an attorney and he was the prevailing party").

Rejecting the clear weight of authority, the Sixth Circuit refused to award petitioner attorney's fees on the ground that a pro se attorney is ineligible for such an award. In reaching this view, the court, apparently attaching great significance to the terms "fees" and "costs," concluded a fee award was appropriate only where a "paying relationship between an attorney and a client" had led to "actual pecuniary losses." Pet. App. 8a. This interpretation, however, has already been considered and rejected by this Court in *Blum v. Stenson*, 465 U.S. 886 (1984), a case the courts below failed even to cite.

The issue in *Blum* was whether respondents, who were represented by the Legal Aid Society of New York, were entitled to attorney's fees under section 1988. The Legal

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U.L. Rev. 303 (1988); Note, *Attorney Fees, Freedom of Information, and Pro Se Litigants: Per Se Prohibitions Frustrate Policies*, 26 Wm. & Mary L. Rev. 349 (1985); Note, *Fees for the Taxpaying Fool: IRC Section 7430 Fee Awards To Pro Se Attorneys*, 38 Case W. Res. L. Rev. 408 (1988). While this Court need not resolve that issue here, petitioner submits that such a construction appears to push the language too far, and that given the reference to "attorneys," the best construction of section 1988 is that it should be governed by its plain language to require the involvement of a licensed attorney.

Aid attorneys did not charge respondents for the representation, but after prevailing sought a fee award pursuant to section 1988. The lower courts approved an award based on prevailing market rates in New York City. The petitioner argued for a requirement "that all fee awards under § 1988 be calculated according to the cost of providing legal services rather than according to the prevailing market rate." 465 U.S. at 892 (footnote omitted).[5] The Court rejected these arguments for a "cost-based standard" and refused to premise fee eligibility on the particular type of legal counsel:

> The statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, *regardless of whether plaintiff is represented by private or non-profit counsel.*

Id. at 895 (footncte omitted; emphasis added). In the face of *Blum*, the court of appeals' assertion (Pet. App. 8a) that pro se attorneys are entitled to no award because no fee was paid and they incur no "actual pecuniary losses" simply collapses.

In construing section 1988, the courts below not only failed to follow the language of the statute; they also failed to follow the principles announced by this Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam), which require that section 1988 be read as creating a presumption in favor of the award of fees. In *Newman*, the Court construed identical language of Title II of the 1964 Civil Rights Act to require that prevailing plaintiffs should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402. Noting that Congress chose to "rely in part upon private litigation as a means of

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[5] The Solicitor General, in an *amicus curiae* brief, argued that the Court should "adopt a cost-related standard only for fee awards to nonprofit legal aid organizations." 465 U.S. at 892.

securing broad compliance with the law," *id.* at 401 (footnote omitted), the Court viewed Title II's fee provisions as intended principally "to encourage individuals injured by racial discrimination to seek judicial relief." *Id.* at 402. Thus, the *Newman* Court establishes a presumption in favor of awarding fees. *Accord, e.g., Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-17 (1978) (reviewing standard and noting its applicability to Title VII of the 1964 Civil Rights Act).

Significantly, in enacting section 1988, Congress "track[ed] the language of the counsel fee provisions of Titles II and VII," and explicitly directed the courts to apply the *Newman* presumption. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) (Senate Report), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5910; H.R. Rep. No. 1558, 94th Cong., 2d Sess. 5 (1976) (House Report). Consequently, any doubt as to the scope of section 1988 should be resolved in favor of awarding fees.

II. THE LEGISLATIVE HISTORY OF SECTION 1988 CONFIRMS THAT PRO SE ATTORNEYS ARE ELIGIBLE FOR ATTORNEY'S FEES

A. Section 1988 Was Drafted In Response To This Court's Decision In *Alyeska Pipeline*, Which Involved Organizational Litigants Indistinguishable From Pro Se Attorneys

The fact that the language of section 1988, by its terms, encompasses pro se attorney litigants should not be surprising. The statute was enacted in direct response to this Court's decision in *Alyeska Pipeline Serv. Corp. v. Wilderness Soc'y*, 421 U.S. 240 (1975), a case involving organizational plaintiffs that are indistinguishable from pro se attorneys.

At common law, the "general practice" in the United States was to not award fees to the prevailing party. *Aracambel v. Wiseman*, 3 Dall. 306 (1796). As early as

1789, however, Congress began to authorize awards of attorney's fees, providing that the federal courts were to follow state law (*Alyeska*, 421 U.S. at 247-49 & nn. 19-20), which at least in some jurisdictions allowed recovery by pro se attorneys.[6] This practice of referring to state law was followed until 1853, when "Congress undertook to standardize the costs allowable in federal litigation." *Id.* at 251. Motivated by a concern that under state law "losing litigants were being unfairly saddled with exorbitant fees for the victor's attorneys," Congress severed the link between federal practice and state law. *Id.* at 251-52. Thus, Congress established a list of specific sums that would be awarded by the courts for various tasks, such as twenty dollars for a trial or final hearing in a civil, criminal, or admiralty case. *Id.* at 252-53 (citing Act of Feb. 26, 1853, 10 Stat. 161). With the exception of the small amounts allowed pursuant to the 1853 statute (now recodified as 28 U.S.C. § 1923), attorney's fees were not recoverable in federal court absent a specific authorizing statute. 421 U.S. at 255-57.

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[6] An early annotation suggests that, under the state laws of this era, pro se attorneys were entitled to fees, noting that "[a]n attorney who appears for himself in a suit to which he is a party is entitled to the same attorney's fees which could be taxed if he appeared for another." 5 American and English Annotated Cases 834 (W. McKinney, D. Garland & H. Greene eds. 1907). More recently, the states have divided on the issue, with a majority of the state courts that have considered the question allowing fees for pro se attorneys. *See, e.g., Quick & Reilly, Inc. v. Perlin*, 411 So.2d 978 (Fla. App. 1982) (awarding fees to pro se attorney); *Winer v. Jonal Corp.*, 169 Mont. 247, 545 P.2d 1094 (1976) (same); *Wells v. Whinery*, 34 Mich. App. 626, 192 N.W.2d 81 (1971) (same); *contra, e.g., O'Connell v. Zimmerman*, 157 Cal. App.2d 330, 321 P.2d 161 (1958); *City of Long Beach v. Sten*, 206 Cal. 473, 274 P. 968 (1929); *Chency v. Ricks*, 168 Ill. 533, 48 N.E. 75 (1897); *cf. Consumers Lobby Against Monopolies v. Public Util. Comm'n*, 25 Cal.3d 891, 915 n.13, 603 P.2d 41, 55 n.13, 160 Cal. Rptr. 124, 138 n.13 (1979) (questioning logic of prior decisions denying fee awards to pro se attorneys and suggesting that a pro se attorney "should be compensated when he represents himself").

In *Alyeska*, the District of Columbia Circuit had developed a broad exception to this principle, allowing fees whenever litigants act as "private attorney generals" and vindicate important statutory rights. 495 F.2d at 1026. The parties seeking fees were three environmental organizations—the Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth—that were represented by either in-house counsel or attorneys serving pro bono. *See id.* at 1037; Pet. Sup. Ct. Br. in *Alyeska* at 43. In awarding fees, the court of appeals made no distinction between the situation in which the organization represented itself and the situation in which the organization was represented through pro bono private counsel. Rather, the court directed that the amount of the fee award be set in accordance with the "reasonable value of [the attorneys'] services," and called for the same type of payment "whether [the] organization is a litigating party or a public interest law firm or defense fund." 495 F.2d at 1037.

This Court reversed. 421 U.S. at 247. Pointing to the historical acceptance of the "American Rule," the Court noted that Congress had made "specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." *Id.* at 260 (footnote omitted). The Court concluded that, absent express statutory authority, the federal courts do not have the power to award attorney's fees to a prevailing party. *Id.* at 269. Again, however, this Court did not suggest that any distinction existed between the situation where the organization represented itself and the situation where it was represented by outside counsel.

The enactment of section 1988 followed shortly after *Alyeska* and was a direct response to that decision. On August 1, 1975, a little over two months after *Alyeska*, Senator Tunney introduced a bill to remedy "an unexpected and anomolous gap in [the] civil rights laws" that had been created by this Court's decision in *Alyeska*. 121 Cong. Rec. 26,806 (1975) (statement of Sen. Tunney).

Referring to other statutes with similar provisions, Senator Tunney noted that his bill "simply applies the type of 'fee-shifting' provision already contained in titles II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards." *Id.*

By legislatively endorsing the type of suit brought in *Alyeska*, Congress intended to make fees broadly available to organizational litigants, without regard to whether the organization represented itself or was retained for purposes of the litigation. Indeed, the legislative history makes this precise point:

> [A] prevailing party is entitled to counsel fees even if represented by an organization *or if the party is itself an organization.*

House Report at 8 n.16 (emphasis added; citations omitted). This language clearly envisions that an organization that represents itself is entitled to attorney's fees.

An attorney representing himself, such as petitioner, is indistinguishable from the pro se organizations that Congress expressly indicated should receive attorney's fees under section 1988. A pro se organizational litigant simultaneously appears as the party and provides the legal representation. The same is true of a pro se attorney. Indeed, contrary to Congress' clear intent, the principal factors relied upon by the court of appeals below in refusing to award fees to petitioner would also apply to bar recovery of fees by a pro se organization.

First, the court reasoned (Pet. App. 8a) that "a statutory provision for attorney's fees assumes a paying relationship between an attorney and a client." This conclusion clearly does not differentiate pro se attorneys from organizational litigants, neither of which pays a fee for specific legal services. Furthermore, as *Blum* makes clear, 465 U.S. at 896, nothing in the statute's

language or history suggests that a traditional paying attorney-client relationship must exist. *Accord, e.g.*, House Report at 8 n.16.

Second, the court of appeals asserted that denying fees to pro se attorneys would help avoid meritless suits by requiring the presence of an independent attorney. According to the court (Pet. App. 7a), granting such awards would undermine Congress' purpose of " 'encourag[ing] potential claimant[s] to seek legal advice before commencing litigation' " so that the attorney could perform an objective "filtering" function. This rationale is difficult to understand—since section 1988 only provides for recovery to successful litigants—and likewise provides no basis for distinguishing pro se attorneys from organizational litigants. There is no reason to believe that the employee of an organizational litigant has significantly more objectivity in assessing a case than a pro se attorney. In both settings, the critical point is that a trained lawyer has evaluated the claim before commencing litigation. If anything, the organization's attorney is less objective in evaluating potential lawsuits, since his sole job is to represent his organization. By contrast, as several courts have recognized, a pro se attorney must weigh the prospects of prevailing in a civil rights suit against the lost opportunity to represent a paying client. *See, e.g., Duncan*, 777 F.2d at 1512; *Ellis*, 625 F.2d at 231; *Rybicki*, 584 F. Supp. at 860.

Third, the court of appeals reasoned (Pet. App. 8a) that because petitioner has not incurred any "legal costs" or "actual pecuniary losses," he cannot recover under section 1988. This contention offers no basis for distinguishing pro se attorneys; like pro se attorneys, organizational litigants incur no "actual pecuniary losses." In any event, as discussed above, the court of appeals' position has already been considered and rejected by this Court in *Blum*.

Fourth, the court of appeals expressed concern over a "cottage industry" of "inactive lawyers who would support themselves on statutory fee awards for self-generated litigation"—a concern founded on the court's own " 'belie[f] that Congress [did not] intend[] to so subsidize attorneys without clients.' " Pet. App. 7a (quoting *Falcone v. IRS*, 714 F.2d at 648). On a superficial level, this concern could serve to distinguish pro se attorneys from organizational litigants. Any attempt to draw such a distinction, however, would enmesh the courts in a case-by-case assessment of the attorney-client relationship, lead to inappropriate line-drawing, and invite evasion.

For example, under the court of appeals' approach, petitioner presumably would be entitled to fees had he structured his lawsuit differently. For example, he could have formed an organization for the purpose of promoting his candidacy in Kentucky, and then filed the suit in the name of that organization. Similarly, petitioner could have sought to initiate a class action on behalf of all minority candidates, or, indeed, on behalf of all presidential candidates forced to comply with Kentucky's unconstitutional electoral scheme. Likewise, he could have named a family member as the party, or simply located a Kentucky voter willing to lend his or her name to the suit. Any of these, or a myriad of other, configurations would have presented the courts below with the identical substantive issue and the identical attorney. Yet, under the reasoning of the courts below, eligibility for attorney's fees in any of these situations would hinge upon how the court chooses to characterize the substance of the relationship.

Given that many, if not most, civil rights cases involve only injunctive relief, a fee award takes on heightened importance as the only means to recoup any of the costs involved in pursuing the litigation. Civil rights litigants therefore have a strong incentive to preserve their elig-

ibility for such awards. This incentive, coupled with the difficult line drawing inherent in the court of appeals' approach, will foster repeated litigation over the appropriate categorization of various attorney-client relationships.

Nothing suggests that Congress intended eligibility for fee awards to turn on this type of case-by-case analysis. Moreover, as discussed in the next section, the court of appeals' "cottage industry" concern is at odds with the central purposes of section 1988.[7]

B. Awarding Fees To Pro Se Attorneys Promotes Section 1988's Goal of Ensuring Full And Effective Enforcement Of The Civil Rights Statutes

The court of appeals' cottage industry concern is either a concern (1) that meritorious suits may be brought or (2) that unmeritorious suits may be brought. The former concern is entirely inappropriate; the latter concern is unsupported.

Section 1988 was specifically designed to encourage the bringing of meritorious civil rights claims. The statute's legislative history makes clear that the civil rights laws "depend heavily on private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." Senate Report at 2. Indeed, the Senate

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[7] Other courts have identified additional policy concerns, but those concerns are applicable only to pro se non-lawyers. *See, e.g., Owens-El v. Robinson*, 694 F.2d 941, 942-43 (3d Cir. 1982) (expressing concern with lack of representation by professionally trained advocates); *Ellis*, 625 F.2d at 231 (expressing concern about the ability of courts to value the services of non-attorney litigants but noting that "[t]he difficulty of placing a dollar value on the legal services performed" does not arise when the party is a lawyer, who typically "has established fees and billing practices").

Report observed that "'[n]ot to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose.'" *Id.* at 3 (quoting *Hall v. Cole*, 412 U.S. 1, 13 (1973)). Similarly, the House Report and the floor debate in the Senate make clear that "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens." House Report at 1; 122 Cong. Rec. 31,471 (1976) (statement of Sen. Scott). For the statutes to be effective, therefore, private citizens must be encouraged to bring lawsuits vindicating civil rights; authorizing attorney's fees was one way Congress offered such encouragement. Denying fees to pro se attorneys would undercut Congress' intent to foster private enforcement actions.[8]

Pro se attorneys have, in fact, made important contributions toward private enforcement efforts, uncovering serious constitutional violations. For instance, the plaintiffs in *Duncan* successfully challenged the refusal of Georgia state officials to call a special election to fill a vacancy on the state supreme court as a violation of their constitutionally protected right to vote. 777 F.2d at 1509. Similarly, in *Rybicki*, a group of plaintiffs, including a pro se attorney, vindicated voting rights by attacking a legislative redistricting plan for election of candidates to the Illinois General Assembly. 584 F. Supp. at 853; *see also Shakman v. Democratic Org. of Cook*

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[8] The interpretation of section 1988 could have farreaching implications for many other fee-shifting statutes, which contain wording virtually identical to section 1988. Indeed, as noted, section 1988 was patterned after the attorney's fees provisions in Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), 42 U.S.C. § 2000e-5(k). The wording of section 1988 is also essentially identical to the Voting Rights Act attorney's fees provision, 42 U.S.C. § 1973(1)(e). Several other attorney's fees statutes, while not identical to section 1988, contain wording that, for all practical purposes, is indistinguishable. These include, among others, the Equal Access to Justice Act, 28 U.S.C. § 2412(b) and (d); the Truth in Lending Act, 15 U.S.C. § 1640(a)(3); and the Copyright Act, 17 U.S.C. § 505.

Cty., 634 F. Supp. at 898 (successful equal protection challenge to patronage practices of Democratic and Republican parties). Indeed, the claims raised by petitioner in this case strongly illustrate the point: petitioner fought and won two lawsuits challenging Kentucky's system for placing presidential primary candidates on the ballot, an issue that the magistrate noted (Pet. App. 20a) affected not just petitioner but also all "voters and future candidates." Denial of attorney's fees to pro se attorneys would hamper this important category of litigants' efforts to expose civil rights violations, undermining Congress' intent to promote vigorous private enforcement of the civil rights laws.

Denying fees to pro se attorneys also would undermine the deterrence value of fee awards. Congress has recognized that the additional cost imposed on a defendant forced to pay attorney's fees can help deter violations of the law, *see, e.g.*, S. Rep. No. 853, 93d Cong., 2d Sess. 17 (1974) (FOIA Committee Report), an effect with heightened importance in the civil rights context where, frequently, the only relief is injunctive. Moreover, denying fees to pro se attorneys results in a windfall to defendants responsible for violating the civil rights laws, who escape liability for attorney's fees solely because the party bringing the private enforcement action happens to be a pro se attorney. Congress' goals would be seriously undermined if fee awards were denied to successful pro se attorney litigants.

If the Sixth Circuit's concern is with unmeritorious suits, the very structure of section 1988 eliminates this concern. Fee awards are available only for "prevailing parties," so inactive attorneys have no incentive to bring frivolous pro se lawsuits. If, nonetheless, frivolous suits are brought, or there are other reasons why the fees sought are not justified in a specific case, adequate mechanisms are available to address the problem. The statute commits the award of fees to the courts' "discretion."

In addition, the legislative history directs that the amount of the fee must be determined with reference to an established framework within which a pro se attorney's "inactive" practice would figure into calculation of the appropriate fee award. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974); House Report at 8 (endorsing *Johnson* factors); Senate Report at 6 (same); *see also Hensley v. Eckerhart*, 461 U.S. 424, 429-30 n.3 (1983) (discussing and applying *Johnson* factors). Finally, sanctions and other remedies are available to address truly frivolous litigation. *See* Fed. R. Civ. P. 11; Fed. R. App. P. 38; *Christiansburg Garment Company*, 434 U.S. at 421 ("a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith").

"Inactive lawyers" therefore have an incentive to initiate pro se litigation only if they identify serious constitutional violations. Contrary to the court of appeals' suggestion, this is precisely the type of private enforcement that Congress intended to encourage. *See* House Report at 1.

Indeed, even without this strong Congressional policy favoring vigorous civil rights enforcement—a policy the court below ignored—the court's concern about a "cottage industry" is unfounded. As the court below conceded (Pet. App. 5a), the vast majority of courts allow fee awards to pro se attorneys in civil rights cases, and there is no indication that such a cottage industry has developed. To the contrary, the case law suggests that pro se attorneys have responded selectively, identifying and rectifying important civil rights violations rather than making a career out of bringing such suits. *See, e.g., Duncan*, 777 F.2d at 1509; *Rybicki*, 584 F. Supp. at 853.

In sum, the Sixth Circuit has misread the language of section 1988, misapplied its purposes, and ignored this Court's governing case law. If allowed to stand, the decision below would undermine the full and effective enforcement of the civil rights laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 15, 1990

No. 80-79

FILED
DEC 10 1980
ROBERT L. STEPHAS, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RICHARD R. KAY, - - - - - - Petitioner,

versus

BRENER HERLIH and the KENTUCKY BOARD OF ELECTIONS, - - - - - - Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a pro se litigant is eligible for attorney's fees under 42 U.S.C. § 1988 simply because he also happens to be an attorney.

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No. 90-79

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD B. KAY, - - - - - - - *Petitioner,*

v.

BREMER EHRLER and the
KENTUCKY BOARD OF ELECTIONS, - - *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

STATUTE INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

Petitioner Richard B. Kay is a resident of the State of Florida and a licensed attorney.[1] Pet. App. 3a. In October

[1]The record does not reflect in what state(s) Petitioner is a licensed attorney or whether Petitioner was admitted to practice law before the District Court for the Eastern District of Kentucky at the time of this lawsuit.

of 1978, he announced that he would seek the Democratic nomination for the office of President of the United States. *Kay* v. *Mills,* 490 F. Supp. 844, 846 (E.D. Ky. 1980).

Petitioner notified the Kentucky State Board of Elections early in 1980 of his wish to appear on the Kentucky Democratic primary ballot. *Id.* The Kentucky State Board of Elections met on April 2, 1980, to select the names of the candidates to be placed on the presidential primary ballot. *Id.* All names placed on the ballot were done so pursuant to KRS 118.580 (repealed 1982), which required that "the board shall nominate as presidential preference primary candidates all those generally advocated and nationally recognized as candidates of the political parties for the office of President of the United States." *Id.* The Board had no regulations or fixed criteria to be used in distinguishing between candidates which it determined to be "generally advocated and nationally recognized as candidates" and those which it did not. *Id.* at 847.

Petitioner's name was not placed on the ballot by the Board of Elections. *Id.* On April 14, 1980, Petitioner filed a lawsuit challenging the constitutionality of KRS 118.580. *Id.* at 847, 849. The District Court determined that the statute was void for vagueness, finding that there was no ascertainable standard by which Petitioner could determine whether or not he complied with the statute's requirements. *Id.* at 852, 853. The court ordered Petitioner's name to be placed on the ballot. *Id.* at 855.

In 1982, the Kentucky General Assembly repealed KRS 118.580. Pet. App. 3a. In 1986, it enacted KRS 118.581, which included the same statutory language as in the repealed KRS 118.580, providing that "the board shall nominate as presidential preference primary candidates all those generally advocated and nationally recognized as candidates

of the political parties for the office of President of the United States." Pet. App. 21a. In September of 1987, the Board of Elections adopted the criteria that a person who had received Federal Election Commission certification to receive federal matching funds in his/her race for President of the United States would fulfill the statutory requirement. Pet. App. 19a - 20a.

On August 10, 1987, Petitioner announced that he once again would seek the Democratic nomination for the office of President of the United States. Pet. App. 3a. In December of 1987, he wrote to the Kentucky Secretary of State,[2] asking that his name be presented to the Board of Elections at its January 8, 1988 meeting, at which time the Board would decide which candidates' names would appear on the ballot for the upcoming presidential primary. *Id.* On January 2, 1988, Petitioner was notified of the criteria that the Board would use in making this decision. Pet. App. 19a - 20a.

On January 11, 1988, Petitioner was informed that he did not qualify as a presidential preference primary candidate and that his name would not appear on the ballot. Pet. App. 20a. On January 12, 1988, Petitioner, acting pro se, filed this lawsuit, challenging KRS 118.581 as unconstitutional. Pet. App. 20a - 21a. In addition, Petitioner challenged the constitutionality of KRS 118.611, pertaining to filing fees for candidates, and sought to have the method by which members of the Board of Elections are appointed declared unconstitutional under Kentucky law. Pet. App. 23a, 26a. Petitioner also moved for a temporary restrain-

[2]At the time of this letter, the Kentucky Secretary of State was Drexel R. Davis. Pet. App. 19a. In January, 1988, Secretary of State Davis was succeeded by Secretary of State Bremer Ehrler. Pet. App. 2a and n.1.

ing order and a preliminary injunction. Pet. App. 1a. Petitioner brought his action under the First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1981, 1983, 1985, and 1988. Pet. App. 1a.

Upon discovery that Petitioner had been placed on the Kentucky presidential preference primary ballot in 1980, the Board of Elections voted to place Petitioner's name on the ballot for the 1988 presidential preference primary. Pet. App. 20a. Petitioner was notified of that decision on January 13, 1988, *id.*, which rendered Petitioner's request for injunctive relief moot. Pet. App. 2a.

Both Petitioner and Respondents moved for summary judgment. Pet. App. 2a. The district court referred the matter to a magistrate, who filed a Report and Recommendation on September 13, 1988. Pet. App. 2a, 19a - 28a. In this Report and Recommendation, the magistrate recommended: (1) that KRS 118.581 and 118.611 be declared unconstitutional; (2) that Petitioner's challenge under Kentucky law of the method by which members of the Board of Elections are appointed be dismissed due to lack of subject-matter jurisdiction; (3) that pursuant to 42 U.S.C. § 1988, Petitioner be awarded litigation costs for his claims against KRS 118.581 and KRS 118.611 but not for that part of the action over which the court has no jurisdiction; and (4) that Petitioner not be awarded attorney's fees pursuant to 42 U.S.C. § 1988. Pet. App. 21a - 28a. As to his recommendation regarding attorney's fees, the magistrate reasoned that the issue was controlled by the Sixth Circuit's decision in *Falcone* v. *Internal Revenue Service*, 714 F.2d 646 (6th Cir. 1983), *cert. denied*, 446 U.S. 908 (1984), which held that pro se litigants who are attorneys are not entitled to attorney's fees under the Freedom of

Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E). Pet. App. 27a - 28a.

The district court, after considering *de novo* the objections filed to the Magistrate's Report and Recommendation by both Petitioner and Respondents, concluded that the Report and Recommendation was "correct in all respects" and adopted it as the findings of fact and conclusions of law of the court. Pet. App. 12a, 16a.[3]

The court made additional findings of fact and conclusions of law regarding the objections to the Magistrate's Report and Recommendation filed by Petitioner and Respondents. First, the court denied Petitioner's request to certify the question of the constitutionality of the composition of the Board of Elections to the Kentucky Supreme Court, based on the court's determination that the question was not one which was appropriate for certification. Pet. App. 12a - 14a. Second, the court disallowed Petitioner's expenses in traveling to Kentucky to file pleadings, based on the court's determination that it was unnecessary for Petitioner to file his pleadings by any other method than mailing. Pet. App. 14a - 16a. Third, the court rejected Petitioner's objection to the recommendation that Petitioner was not entitled to attorney's fees because he was a pro se litigant, stating that "[t]he Magistrate's analysis and conclusion on this issue is correct in all respects and the court hereby adopts same." Pet. App. 16a.

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[3]The 1990 Kentucky Legislature amended KRS 118.581 to state, in pertinent part, that "the board shall nominate as presidential preference primary candidates all those candidates of the political parties for the office of President of the United States who have qualified for matching federal campaign funds." KRS 118.581, as amended.

Petitioner appealed the denial of attorney's fees to the Sixth Circuit Court of Appeals, which affirmed the district court's judgment in a divided decision. Pet. App. 1a - 11a. The court agreed that Petitioner should not receive attorney's fees based upon its rejection in *Falcone* v. *Internal Revenue Service* of "the proposition that opportunity costs constitute actual pecuniary losses for which a *pro se* attorney deserves compensation." Pet. App. 8a. The court determined that, because Petitioner had not incurred any expenses for legal representation, he could not recover attorney's fees under 42 U.S.C. § 1988. Pet. App. 8a. The court decided that the plain language of a statutory provision for attorney's fees "assumes a paying relationship between an attorney and a client." Pet. App. 8a.

In addition, the court determined that one of the major objectives of the statutory provision for attorney's fees is to provide for the filtering of meritless claims by objective attorneys; such an objective is frustrated when an attorney represents himself. Pet. App. 8a. Moreover, the court stated that "the fact that the public might benefit from a *pro se* attorney's actions did not make him more deserving of fees than a *pro se* non-attorney plaintiff." Pet. App. 8a.

Judge Jones dissented. Pet. App. 9a - 11a. In his opinion, the statutory purposes underlying the Freedom of Information Act and supporting the rationale of *Falcone* "are not present to the same extent, if at all, under section 1988." Pet App. 11a. Accordingly, he stated that he would allow Petitioner to recover attorney's fees "equivalent to the opportunity cost of handling other litigation." Pet. App. 11a.

SUMMARY OF ARGUMENT

The language of 42 U.S.C. § 1988 indicates that pro se litigants are ineligible for attorney's fees, whether or not those pro se litigants are attorneys. Indeed, the definition of the term "attorney's fee" itself ("Charge to client for services performed . . .", Black's Law Dictionary 614 [6th ed. 1990]) presupposes the existence of an attorney who is retained to represent the interests of a client. A person who receives attorney's fees does so because of work that he has done as an attorney on behalf of another, his client. On the other hand, a pro se litigant, whether or not an attorney, acts for himself; he cannot qualify for an attorney's fee, because he has done no work as an attorney on behalf of another who is his client. In fact, the phrases "pro se" and "attorney's fees" have such opposite meanings as to be mutually exclusive.

The fact that a pro se litigant can label himself as an attorney does not change this result. In reality, a pro se litigant who can label himself as an attorney is no different than a pro se litigant who cannot label himself as an attorney; neither one is required to be admitted to practice law to appear before the court in a civil rights action, because each is representing only himself.

The language of 42 U.S.C. § 1988 indicates that a fee that is requested under that statute will qualify as an attorney's fee only if it constitutes a charge by an attorney for services that the attorney performed for his client. While the amount that is actually charged to a client by an attorney should not be the factor that decides whether a requested fee qualifies as an attorney's fee, the existence of an attorney-client relationship that would authorize a

charge or payment for services rendered should be the deciding factor in making such a determination.

The legislative history of 42 U.S.C. § 1988 makes it clear that Congress had no intent to make pro se litigants eligible for attorney's fees. Congress' main concern in enacting this statutory provision was with citizens who might be unable to assert their civil rights because they could not afford to hire attorneys to represent them in court. Thus, Congress' intent in enacting the statute was to help provide the means by which citizens would be able to retain attorneys to represent them in civil rights actions.

Congress made no mention of compensating litigants who represent themselves in civil rights cases in the legislative history of 42 U.S.C. § 1988. Although Petitioner attempts to create such a history by citing the fact that Congress was concerned with organizational parties being eligible for attorney's fees, the organizational parties with which Congress was concerned were all represented by counsel. Thus, these organizations were part of an attorney-client relationship, the essential requirement for determining eligibility for attorney's fees. None of these parties was comparable to a pro se litigant.

Denying attorney's fees to pro se litigants who are attorneys in no way undermines Congress' intent to foster private enforcement actions. Rather, it simply places citizens who happen to be attorneys in the same position as all other citizens, who are encouraged by 42 U.S.C. § 1988 to vindicate their civil rights by retaining attorneys to represent them in their civil rights actions. Thus, Congress' intent to foster private enforcement actions is fully met in the same way for all citizens.

No justification exists to create a distinction between pro se litigants who are attorneys and pro se litigants who

are not attorneys in determining eligibility for attorney's fees under 42 U.S.C. § 1988. All pro se litigants are in the same position at the time they request attorney's fees, *i.e.*, they have prevailed in their civil rights lawsuits after expending considerable time in vindicating their rights. They all may have lost business opportunities due to time spent on their lawsuits and away from their businesses. In addition, they all may have lacked the objectivity and detachment in proceeding with their lawsuits that would have existed if they had retained counsel to represent them. Moreover, they all may have uncovered serious constitutional violations.

In sum, the statutory language, the legislative history, and policy reasons support the conclusion that pro se litigants who happen to be attorneys are not eligible for attorney's fees under 42 U.S.C. § 1988. The decision below should be affirmed.

ARGUMENT

I. THE LANGUAGE OF 42 U.S.C. § 1988 DOES NOT INCLUDE PRO SE LITIGANTS IN THE GROUP OF PREVAILING PARTIES THAT ARE ELIGIBLE FOR ATTORNEY'S FEES.

The lower courts that have considered the question have uniformly agreed that a pro se litigant who is not an attorney is not eligible for an award of attorney's fees under 42 U.S.C. § 1988. *See, e.g., Gonzalez* v. *Kangas*, 814 F.2d 1411 (9th Cir. 1987); *Smith* v. *DeBartoli*, 769 F.2d 451 (7th Cir. 1985), *cert. denied*, 475 U.S. 1067 (1986); *Redding* v. *Fairman*, 717 F.2d 1105 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *Turman* v. *Tuttle*, 711 F.2d 148 (10th Cir. 1983); *Owens-El* v. *Robinson*, 694 F.2d 941 (3rd Cir. 1982); *Pitts* v. *Vaughn*, 679 F.2d 311 (3rd Cir. 1982); *Wright* v. *Crowell*, 674 F.2d 521 (6th Cir. 1982); *Cofield* v. *City of*

Atlanta, 648 F.2d 986 (5th Cir. 1981); *Lovell* v. *Snow*, 637 F.2d 170 (1st Cir. 1981); *Rheuark* v. *Shaw*, 628 F.2d 297 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); *Davis* v. *Parratt*, 608 F.2d 717 (8th Cir. 1979); *Williams* v. *Sumner*, 648 F. Supp. 510 (D. Nev. 1986); *Peniman* v. *Cartwright*, 550 F. Supp. 1302 (S.D. Iowa 1982); *Grooms* v. *Snyder*, 474 F. Supp. 380 (N.D. Ind. 1979).[4]

Some courts, including the Sixth Circuit Court of Appeals in the instant case, have applied this general rule to hold that a pro se litigant who is an attorney is not eligible for an award of attorney's fees under 42 U.S.C. § 1988. *See, e.g., Levine v. Heffernan*, 691 F. Supp. 173 (W.D. Wis.); *Lawrence* v. *Staats*, 586 F. Supp. 1375 (D.D.C. 1984).[5]

[4]In examining other federal statutory provisions that also allow for attorney's fees, courts generally have agreed that a pro se litigant who is not an attorney is not eligible for an award of attorney's fees. *See, e.g., Nackel* v. *Dept. of Transportation*, 845 F.2d 976 (Fed. Cir. 1988) (Back Pay Act, 5 U.S.C. § 5596, and Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A)); *Merrell* v. *Block*, 809 F.2d 639 (9th Cir. 1987) (Equal Access to Justice Act); *Carter* v. *Veterans Administration*, 780 F.2d 1479 (9th Cir. 1986) (Freedom of Information Act, 5 U.S.C. § 522(a)(4)(E)); *Crooker* v. *Environmental Protection Agency*, 763 F.2d 16 (1st Cir. 1985) (Equal Access to Justice Act); *Cunningham* v. *Federal Bureau of Investigation*, 664 F.2d 383 (3rd Cir. 1981) (Freedom of Information Act); *Hannon* v. *Security National Bank*, 537 F.2d 327 (9th Cir. 1976) (Truth in Lending Act, 15 U.S.C. § 1640(a)(3)). *Contra Cox* v. *United States Department of Justice*, 601 F.2d 1 (D.C. Cir. 1979) (Freedom of Information Act).

[5]Some courts also have held that a pro se litigant who is an attorney is not eligible for an award of attorney's fees under other federal statutory provisions that allow for attorney's fees. *See, e.g., Aronson* v. *United States Department of Housing and Urban Development*, 866 F.2d 1 (1st Cir. 1989) (Freedom of Information Act); *United States* v. *McPherson*, 840 F.2d 244 (4th

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Other courts have refused to apply this general rule in such circumstances and have held that a pro se litigant who is an attorney is eligible for an award of attorney's fees under 42 U.S.C. § 1988. *Duncan v. Poythress*, 777 F.2d 1508 (11th Cir. 1985)(en banc), *cert. denied*, 475 U.S. 1129 (1986); *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980); *Shakman v. Democratic Organization of Cook County*, 634 F. Supp. 895 (N.D. Ill. 1986); *Lanasa v. City of New Orleans*, 619 F. Supp. 39 (E.D. La. 1985); *Rybicki v. State Board of Elections*, 584 F. Supp. 849 (N.D. Ill. 1984).[6]

Interpreting the meaning of 42 U.S.C. § 1988, as in all cases of statutory construction, must begin with the language of the statute itself. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982). When the statutory language is examined, it becomes clear that those courts that

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Cir. 1988) (Internal Revenue Code, 26 U.S.C. § 7430); *Falcone* v. *Internal Revenue Service*, 714 F.2d 646 (6th Cir. 1983), *cert. denied*, 466 U.S. 908 (1984) (Freedom of Information Act); *White* v. *Arlen Realty & Development Corp.*, 614 F.2d 387 (4th Cir.), *cert. denied*, 447 U.S. 923 (1980) (Truth in Lending Act); *Mayock* v. *Immigration and Naturalization Service*, 736 F. Supp. 1561 (N.D. Cal. 1990) (Freedom of Information Act).

[6]Some courts also have held that a pro se litigant who is an attorney is eligible for an award of attorney's fees under other federal statutory provisions that allow for attorney's fees. *See, e.g., Jones* v. *Lujan*, 883 F.2d 1031 (D.C. Cir. 1989) (Equal Access to Justice Act); *Cazalas* v. *United States Department of Justice*, 709 F.2d 1951 (5th Cir. 1983) (Freedom of Information Act); *Cuneo* v. *Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977) (Freedom of Information Act).

State courts that have considered the question of whether a pro se litigant who is an attorney is eligible for an award of attorney's fees under state law are split on this issue. *See Weaver* v. *Laub*, 574 P.2d 609, 612 n.4 (Okla. 1978) and cases cited therein.

have held that pro se litigants are ineligible for attorney's fees are correct, whether or not those pro se litigants are attorneys.

42 U.S.C. § 1988 provides that in certain federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." By the plain language of the statute, the court in a federal civil rights action is given the limited discretion to allow (1) an attorney's fee, (2) that is reasonable, and (3) that is awarded to the prevailing party (other than the United States). At issue in this case is the meaning that should be given to the term "attorney's fee."

Petitioner concedes that the term "attorney's fee" should exclude pro se litigants who are not attorneys from eligibility for attorney's fees, because that language requires the involvement of a licensed attorney. Pet. Brief 9 - 10 n.4. Petitioner argues, however, that the "involvement" required by the statute is that service be provided by an attorney, which is accomplished, he says, when a litigant who is an attorney proceeds pro se in a civil rights lawsuit. *Id.* at 9 - 10.

This position fails to consider the clear meaning of the term "attorney's fee." Black's Law Dictionary defines "attorney fees" as: "Charge to client for services performed (*e.g.* hourly fee, flat fee, contingency fee)." Black's Law Dictionary 614 (6th ed. 1990). This definition presupposes the existence of two separate entities, one of which is an attorney and one of which is the attorney's client. Indeed, the word "attorney" is generally defined "in terms of someone who acts for *another*, someone who is employed as an agent to represent *another*, someone who acts at the appointment of *another*." *Duncan v. Poythress*, 777 F.2d

1508, 1518 and definitions at 1519 - 1521 (11th Cir. 1985) (Roney, J., dissenting) (emphasis in original), *cert. denied*, 475 U.S. 1129 (1986).

On the other hand, a pro se litigant, whether or not an attorney, acts for himself. In fact, the term "pro se" means "[a]ppearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court." Black's Law Dictionary 1221 (6th ed. 1990).

The phrases "pro se" and "attorney's fees" have such opposite meanings as to be mutually exclusive. A person who is a pro se litigant acts for himself. A person who receives attorney's fees does so because of work that he has done as an attorney on behalf of another, his client. Accordingly, a pro se litigant, whether or not he is an attorney, cannot qualify for an "attorney's fee," because he has done no work as an attorney on behalf of another who is his client. *See, e.g., Jones v. Lujan*, 883 F.2d 1031, 1037 (D.C. Cir. 1989) (Silberman, J., concurring) (interpreting the phrase "attorney's fees" in the Equal Access to Justice Act as necessarily referring to a lawyer representing another person "since we do not describe the costs an individual incurs as 'fees' he charges himself"); *Merrell v. Block*, 809 F.2d 639, 642 (9th Cir. 1987) (interpreting the phrase "attorney's fees" in the Equal Access to Justice Act as indicating that a person must retain an attorney to qualify for an attorney's fee award).

Petitioner's position also is faulty because it confuses the *label* of attorney with the *action* that is taken as an attorney. As we now most commonly use the word "attorney," it means "attorney at law," which is defined as a "[p]erson admitted to practice law in his respective state and authorized to perform both civil and criminal legal functions for clients. . . ." Black's Law Dictionary 128 (6th

ed. 1990). Thus, a person who is admitted to practice law will receive the label of "attorney"; that label authorizes him to perform legal functions for clients. Until he performs such a legal function for a client, however, he is not acting as an attorney. In other words, the only thing that differentiates an attorney from a non-attorney when it comes to conducting legal matters is the attorney's authorization to represent another person. A pro se litigant who can label himself as an attorney is no different than a pro se litigant who cannot label himself as an attorney when it comes to conducting legal matters for themselves in a civil rights action; neither one is required to be admitted to practice law to appear before the court in such an action, because each is representing only himself. A pro se litigant who is an attorney may be able to use the attorney label, but he is not acting as an attorney in such litigation. Indeed, he is acting in the same way as all other pro se litigants, *i.e.*, on his own behalf.[7]

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[7]The problem with Petitioner's position is emphasized by the fact that Petitioner fails to offer a definition for the word "attorney." If, as Petitioner proposes, a pro se litigant who happens to be able to use the label "attorney" is eligible for attorney's fees, which pro se litigants will qualify for such an award? Will this group of pro se litigants be limited to those who are "licensed" attorneys, as Petitioner appears to suggest? Pet. Brief 9 - 10 n. 4. If so, will this group include attorneys who are licensed to practice anywhere in the United States (or world), or will it be limited to those who are licensed to practice in the state in which the court sits? Will this group include attorneys who are not admitted to practice before the court, or will it be limited to those who have been so admitted?

Of course, when a litigant proceeds pro se, he is acting as a litigant, not as an attorney, and does not need to be licensed or admitted to practice in order to pursue his civil rights claim.

Petitioner appears to argue that his position is correct, and that pro se litigants who are attorneys should be eligible for attorney's fees, because the Sixth Circuit incorrectly concluded that a fee award is appropriate only where there is a paying relationship between an attorney and a client. Pet. Brief 10 - 11. The focus in examining such a standard, however, should not be on the word "paying" as indicating an actual payment or charge made for services rendered by the attorney to his client. Rather, the focus should be on the existence of an attorney-client relationship that would *authorize* a charge or payment for services rendered. *See Jones* v. *Lujan*, 883 F.2d at 1037 (Silberman, J., concurring).

Blum v. *Stenson*, 465 U.S. 886 (1984), is not to the contrary. In that case, this Court decided that "reasonable fees" under 42 U.S.C. § 1988 "are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel." *Id.* at 896 (footnote omitted). Accordingly, the actual paying relationship between an attorney and his client is irrelevant to determining what "reasonable" fees should be paid as attorney's fees under 42 U.S.C. § 1988.

This decision, however, clearly presupposes the existence of an attorney-client relationship between the plaintiff and the private or non-profit counsel that represents the plaintiff. Thus, while the amount that is actually charged to a client by an attorney should not be the factor that decides whether a requested fee qualifies as an "attorney's fee" under 42 U.S.C. § 1988, the existence of an attorney-client relationship that would authorize a charge or

payment for services rendered should be the deciding factor in making such a determination.[8]

In sum, the use of the term "attorney's fee" in 42 U.S.C. § 1988 presupposes the existence of an attorney who has been retained to represent a client. Accordingly, a fee that is requested under that statute will qualify as an attorney's fee only if it constitutes a charge by an attorney for services that the attorney performed for that client. A pro se litigant, whether or not an attorney, is appearing for himself; he has no attorney-client relationship with an attorney and, therefore, there is no attorney to request or to receive attorney's fees for services that the attorney performed for him. Therefore, a pro se litigant is ineligible for attorney's fees under 42 U.S.C. § 1988.

II. THE LEGISLATIVE HISTORY OF 42 U.S.C. § 1988 MAKES IT CLEAR THAT CONGRESS HAD NO INTENT TO MAKE PRO SE LITIGANTS ELIGIBLE FOR ATTORNEY'S FEES.

In attempting to determine the meaning of the term "attorney's fee" in 42 U.S.C. § 1988, it is helpful "'to re-

[8]Petitioner also is incorrect in his argument (Pet. Brief 11 - 12) that his position should be adopted because of this Court's ruling in *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968), which held "that one who succeeds in obtaining an injunction under [Title II of the Civil Rights Act of 1964] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402. Such a presumption in favor of awarding fees applies only *after* a plaintiff has satisfied the threshold requirements of the statute, *i.e.*, that the plaintiff prevailed, that the fees requested are attorney's fees, and that the fees requested are reasonable. In the instant case, the determination at issue is the threshold question of whether the requested fees are, in fact, "attorney's fees." The presumption in favor of awarding fees will apply only if this court decides that the requested fees are "attorney's fees."

member that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'" *Watt* v. *State of Alaska*, 451 U.S. 259, 266 n. 9 (1981), *quoting Cabell* v. *Markham*, 148 F.2d 737, 739 (2nd Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945). The discovery of the purpose of 42 U.S.C. § 1988 indicates that Congress had no intent to make pro se litigants eligible for attorney's fees.

In enacting 42 U.S.C. § 1988, Congress' main concern was with citizens who might be unable to assert their civil rights because they could not afford to hire attorneys to represent them in court. That concern was stated in the Senate Report that accompanied the bill that was ultimately enacted as 42 U.S.C. § 1988:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S. Code Cong. and Admin. News 5908, 5910.

That concern also was expressed in the House Report that accompanied a House Bill that was similar in wording to the enacted Senate bill:

> Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, H.R. 15460 is designed to give such persons effective access to the

> judicial process where their grievances can be resolved according to law.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976).[9]

Clearly, Congress' intent in enacting 42 U.S.C. § 1988 was to help provide the means by which citizens would be able to retain attorneys to represent them in civil rights actions. The language in this legislative history "presupposes a relationship of attorney and client." *Davis* v. *Parratt,* 608 F.2d 717, 718 (8th Cir. 1979). Indeed, "the purpose of section 1988 is not to compensate a worthy advocate but to enable and encourage a wronged person to retain a lawyer." *Cofield* v. *City of Atlanta,* 648 F.2d 986, 988 (5th Cir. 1981). In other words, this congressional language "is intended primarily to encourage lawyers to take on the representation of plaintiffs suing to vindicate their civil rights." *Levine* v. *Heffernan,* 691 F. Supp. at 175.

Congress made no mention of compensating litigants who represent themselves in civil rights cases in the legislative history of 42 U.S.C. § 1988. Petitioner argues that Congress envisioned that an organization that represents itself would be entitled to attorney's fees, and that if this is true for an organization it also ought to apply to a litigant who represents himself. Pet. Brief 15. Petitioner bases this argument on language in the relevant House

[9] H.R. 15460 stated:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 5 (1976).

Report and on the fact that 42 U.S.C. § 1988 was enacted in response to this Court's decision in *Alyeska Pipeline Service Co.* v. *The Wilderness Society,* 421 U.S. 240 (1975). Each of Petitioner's interpretations is faulty and will be addressed in turn.

The language in the House Report on which Petitioner relies states:

> [A] prevailing party is entitled to counsel fees even if represented by an organization or if the party is itself an organization.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 n.16 (citations omitted). This language, however, does not even consider the manner in which an organization that is a party is represented. In fact, the one case cited in the House Report in support of this proposition concerns a non-profit organization, Puerto Rican Legal Defense and Education Fund, Inc., that was represented by legal counsel. *Torres* v. *Sachs,* 69 F.R.D. 343 (S.D. N.Y. 1975), *aff'd,* 538 F.2d 10 (2d Cir. 1976). This organization was not comparable to a pro se litigant, because it was the client in an attorney-client relationship that was established for this lawsuit. The existence of such a relationship, an essential requirement for determining eligibility for attorney's fees, does not support Petitioner's position.

Neither is Petitioner's position supported by the fact that Congress enacted 42 U.S.C. § 1988 in response to this Court's decision in *Alyeska,* which held that federal courts could not award attorney's fees to a prevailing party without congressional authorization. *Alyeska,* 421 U.S. at 269. Petitioner argues that, "[b]y legislatively endorsing the type of suit brought in *Alyeska,* Congress intended to make fees broadly available to organizational litigants, without

regard to whether the organization represented itself or was retained for purposes of litigation." Pet. Brief 15. In the type of suit brought in *Alyeska*, however, the parties seeking attorney's fees were organizations that were represented either by in-house counsel or by pro bono attorneys. *Id.* at 14. Thus, each of these parties was the client in an attorney-client relationship, an essential requirement for determining eligibility for attorney's fees. None of these parties was comparable to a pro se litigant.[10]

Petitioner also argues that "[d]enying fees to pro se attorneys would undercut Congress' intent to foster private enforcement actions." Pet. Brief 19 (footnote omitted). Such a denial of attorney's fees, however, simply places citizens who happen to be attorneys in the same position as all other citizens. Indeed, all citizens, whether or not they are attorneys, are encouraged by 42 U.S.C. § 1988 to vindicate their civil rights by retaining attorneys to represent them in their civil rights actions. It is in this way that Congress' intent to foster private enforcement actions is fully met in the same way for all citizens.

In sum, the clearly stated congressional intent in providing for attorney's fees in 42 U.S.C. § 1988 is to give victims of civil rights violations access to the judicial process by enabling them to retain attorneys. There is no congressional intent to provide attorney's fees to anyone other than an attorney who has been retained to represent another person who was a victim of a civil rights violation. A pro se litigant, whether an attorney or a non-attorney,

[10]Contrary to ~~Petitioner~~'s suggestion, an organization is not proceeding pro se when it is represented by in-house counsel. The organization has retained an attorney (in-house counsel) to represent it and has established an attorney-client relationship with that attorney.

has not been retained to represent such a victim and therefore is not eligible for attorney's fees.[11]

III. NO JUSTIFICATION EXISTS TO CREATE A DISTINCTION BETWEEN PRO SE LITIGANTS WHO ARE ATTORNEYS AND PRO SE LITIGANTS WHO ARE NOT ATTORNEYS IN DETERMINING ELIGIBILITY FOR ATTORNEY'S FEES UNDER 42 U.S.C. § 1988.

As discussed above, the language of 42 U.S.C. § 1988 and the legistlative history treat all pro se litigants in the same way, indicating that they are not eligible for attorney's fees. There is no justification for creating a differentiation between pro se litigants who are attorneys and those who are not.

Indeed, all pro se litigants are in the same position at the time they request attorney's fees under 42 U.S.C. § 1988, *i.e.*, they have prevailed in their civil rights lawsuits after expending what may have been considerable time in vindicating their rights.[12] They all may have lost business opportunities due to time spent on their lawsuits and away from their businesses. In addition, they all may have lacked the objectivity and detachment in proceeding with their law-

[11]This result does not undermine the deterrence value of fee awards, as alleged by Petitioner (Pet. Brief 20), because Congress expressed no intention of having fee awards made under 42 U.S.C. § 1988 used as a deterrent. Citizens who wish to use such fees for their deterrent value may retain attorneys to represent them. However, the award of attorney's fees under 42 U.S.C. § 1988 is not meant as a punitive measure. *See Lanasa* v. *City of New Orleans*, 619 F. Supp. at 42 n.4.

[12]Of course, even if these litigants had hired attorneys to represent them, they would have needed to spend a good deal of time working on their lawsuits. Such is the nature of litigation. *See, e.g., Cunningham* v. *Federal Bureau of Investigation*, 684 F.2d at 386.

suits that would have existed if they had retained counsel to represent them. *See, e.g., Aronson* v. *United States Department of Housing and Urban Development,* 866 F.2d 1, 5 (1st Cir. 1989); *White* v. *Arlen Realty & Development Corp.,* 614 F.2d 387, 388 (4th Cir.), *cert. denied,* 477 U.S. 923 (1980).

Petitioner appears to argue that a distinction should be made between pro se litigants who are attorneys and pro se litigants who are not attorneys, because "[p]ro se attorneys have, in fact, made important contributions toward private enforcement efforts, uncovering serious constitutional violations." Pet. Brief 19. Such a distinction is not valid, however, because pro se litigants who are not attorneys may also uncover serious constitutional violations. Indeed, a plaintiff must have prevailed in his civil rights claim for the question of eligibility for attorney's fees even to be raised. No justifiable distinction can be made between pro se litigants who are attorneys and those who are not.

In sum, the statutory language, the legislative history, and policy reasons support the decision that pro se litigants who happen to be attorneys are not eligible for attorney's fees under 42 U.S.C. § 1988.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 19, 1990

FILED
JAN 22 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-79

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Supreme Court of the United States

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Petitioner,

v.

BREMER EHRLER AND THE KENTUCKY BOARD OF ELECTIONS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE LANGUAGE OF SECTION 1988 AUTHORIZES FEE AWARDS TO PRO SE ATTORNEYS

Section 1988 authorizes a reasonable "attorney's" fee to prevailing parties in civil rights cases. Respondents and their amici argue that petitioner falls outside the language of Section 1988 because, even though he is a "lawyer," he is not an "attorney" when he appears pro se (Resp. Br. 13; U.S. Br. 15; Hawaii Br. 4). According to respondents and amici, the concept of "attorney" involves, in addition to legal training, an agency relationship with a client; consequently, they argue, " 'the

terms 'pro se' and 'attorney' are mutually exclusive'" (U.S. Br. 15 (quoting authority)). This Talmudic distinction between "lawyer" and "attorney" is without merit and should be rejected.

In support of their position, respondents and amici rely on various dictionary definitions of attorney as one who is appointed to act for another, and cite the agency usage in such terms as "power of attorney" and "attorney in fact" (*see* Resp. Br. 12-13; U.S. Br. 14-15 & n.8; Hawaii Br. 4). In fact, however, this is *not* the common usage of the term. As Black's Law Dictionary notes, after referring to the historical usage of "attorney" to describe an agency relationship:

> *In its most common usage* . . . unless a contrary meaning is clearly intended, this term [attorney] means "attorney at law," "lawyer" or "counselor at law."

Black's Law Dictionary 128 (6th ed. 1990) (emphasis added). Even respondents concede that the term "attorney" is "most commonly us[ed]" to refer to a person licensed to practice law" (Resp. Br. 11). And both the court of appeals (Pet. App. 3a) and the magistrate (Pet. App. 27a), whose views were adopted by the district court (Pet. App. 16a), expressly recognized petitioner as a "licensed attorney." [1]

[1] Although respondents assert that the terms "pro se" and "attorney's fees" are "mutually exclusive" (Resp. Br. 13), courts frequently use the term "attorney" in the context of pro se representation. *See, e.g., Falcone v. IRS*, 466 U.S. 908 (1984) (White, J., dissenting from denial of cert.) ("pro se attorney plaintiffs"); *Poythress v. Kessler*, 475 U.S. 1129 (1986) (Burger, C.J., dissenting from denial of cert.) ("a *pro se* plaintiff who is also an attorney"); *Cheung v. Youth Orchestra Foundation of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990) ("*pro se* attorney"); *Prince v. Poulos*, 876 F.2d 30, 33 n.2 (5th Cir. 1989) ("pro se attorney's race discrimination suit"); *Naekel v. FAA*, 845 F.2d 976, 978, 981 (Fed. Cir. 1988) ("pro se attorney fees"); *United States v. Espinosa*, 771 F.2d 1382, 1399 (10th Cir. 1985) ("pro se attorney defendant"), *cert. denied*, 474 U.S. 1023 (1985).

Plainly, the common usage of "attorney" as a synonym for "lawyer" should be preferred over the historical usage that refers to an agency relationship. Even the Solicitor General concedes (U.S. Br. 12) that statutory terms should be given their "ordinary meaning." *See Moskal v. United States*, No. 89-964 (Dec. 3, 1990). Since petitioner unquestionably falls within the ordinary meaning of the term "attorney" (Pet. App. 3a), and since respondents and amici do not seriously claim that he fails to satisfy any of the other requirements of section 1988, he is entitled to a fee award.[2]

II. THE HISTORY AND PURPOSES OF SECTION 1988 SUPPORT THE AWARD OF FEES TO PRO SE ATTORNEYS

Petitioner's opening brief (Pet. Br. 12-18) explained that section 1988 was passed by Congress in the wake of this Court's decision in *Alyeska Pipeline Serv. Corp. v. Wilderness Soc'y*, 421 U.S. 240 (1975), to remedy "an anomalous gap" in, and encourage vigorous enforcement of, the civil rights laws. S. Rep. No. 1011, 94th Cong., 2d Sess. 1 (1976) ("Senate Report"); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) ("House Report"). In particular, Congress intended to make fees available

[2] *See Jones v. Lujan*, 883 F.2d 1031, 1035 (D.C. Cir. 1989) (noting that it "strain[s] conventional language to infer any ambiguity regarding the scope of the meaning of 'attorney fees' simply because the statute does not state 'fees of an attorney or lawyer'").

Respondents, joined by the Solicitor General (Resp. Br. 12-13; U.S. Br. 16-20), also focus attention on the words "fees" and "costs," arguing that these terms, too, implicitly exclude a pro se attorney because no fee is paid and no costs are incurred. That argument is foreclosed, however, by this Court's decision in *Blum v. Stenson*, 465 U.S. 886 (1984), which held that a section 1988 fee award is available regardless of whether the particular attorney is paid a "fee" or the prevailing party incurs any actual "costs" for legal services. Respondents themselves concede that "the actual paying relationship between an attorney and his client is irrelevant" (Resp. Br. 15).

to organizational litigants who represented themselves in civil rights litigation—litigants indistinguishable from pro se attorneys. The language of section 1988, which explicitly excludes the United States from eligibility for fees, confirms Congress' intent. Had Congress wanted to exclude all organizations represented by their own attorneys, the explicit reference to the United States would have been unnecessary.

Respondents and their amici concede (Resp. Br. 18-19; U.S. Br. 24-25) that Congress intended organizational litigants to receive section 1988 fee awards; they could hardly do otherwise given the clear indication of congressional intent (*see* Pet. Br. 14-15). Instead, they devote the bulk of their effort to asserting that pro se attorneys should be treated like pro se non-attorneys rather than organizational litigants, and to arguing that Congress' sole rationale for section 1988 was to compensate clients who employ lawyers for a fee. Neither effort is successful.

First, respondents and amici maintain (Resp. Br. 14, 21-22; U.S. Br. 25-28) that attorneys should be treated, for purposes of section 1988, the same as non-attorneys, arguing that there is no rational distinction between the two categories of pro se litigants. Respondents go so far as to suggest that "the only thing that differentiates an attorney from a non-attorney when it comes to conducting legal matters is the attorney's authorization to represent another person" (Resp. Br. 14). This assessment defies common sense: it overlooks the specialized training attorneys receive and hence the greater contribution they make to the illumination and resolution of cases. It also ignores the higher obligations that lawyers undertake, including the highly developed set of ethical obligations that constrain and control attorneys' behavior, *see, e.g.*, ABA Model Rules of Professional Conduct, Rule 3.3 (Candor Toward the Tribunal), and the more ready

ability to impose sanctions on attorneys, including the potential loss of a valuable, state-conferred license.[3]

Thus, as petitioner has shown (Pet. Br. 15-17), pro se attorneys are more appropriately compared to organizational litigants—a category of litigants clearly eligible for a section 1988 fee award. As petitioner explained (Pet. Br. 15-18), a pro se attorney is indistinguishable from a pro se organizational litigant: both simultaneously appear as the party and provide the legal representation.

Respondents and their amici (Resp. Br. 20 & n.10; U.S. Br. 17-19, 25) dismiss the comparison between organizations and pro se attorneys by once again relying on the term "attorney" as involving a form of agency. Indeed, for respondents, this elevation of form over substance is sufficient; they fail even to address petitioner's assertion (Pet. Br. 17) that distinguishing pro se attorneys from organizational litigants on such a basis would involve the courts in a case-by-case assessment of the attorney-client relationship, lead to inappropriate line-drawing, and invite evasion.

The Solicitor General, in contrast, concedes that his suggested organization-pro se attorney distinction breaks down, and urges that, in some circumstances, his theory would require that an organization be treated as if it

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[3] *Compare Jones v. Smith*, 99 F.R.D. 4, 8-9 (M.D. Pa. 1983) (sanctioning pro se attorney plaintiff, noting that it "consider[s] Plaintiff's conduct all the more egregious due to the fact that Plaintiff is an attorney"), *aff'd*, 734 F.2d 6 (3rd Cir. 1984), *with Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (per curiam) (noting "settled law" that pleadings "not prepared by counsel . . . are held 'to less stringent standards than formal pleadings drafted by lawyers'") (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). *See generally Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 487-491 (1988) (O'Connor, J., dissenting) (reviewing special characteristics of attorneys).

were a pro se attorney. To identify such situations, the Solicitor General proposes a new, unspecified form of case-by-case assessment (U.S. Br. 19):

> Lawyers representing bona fide organizations are eligible for a fee awards, but organizations that are no more than the lawyer's alter ego do not transform a pro se lawyer into an attorney.

Noticeably absent, however, from the Solicitor General's brief is any attempt to delineate more clearly the appropriate standard or even to apply it to the specific examples mentioned in petitioner's opening brief (Pet. Br. 17) and in the amicus curiae brief in support of petitioner filed by Public Citizen (Br. 11-12).[4] Under the Solicitor General's approach, courts would be required to evaluate the precise nature of organizational litigants to determine if they were so closely identified or associated with their attorneys that they should be considered the same for purposes of section 1988. This analysis is akin to piercing the corporate veil—an issue of notorious complexity. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 n.5 (1969).[5]

At bottom, the Solicitor General's approach adds another layer to the already complex task of arriving at an appropriate award under section 1988. Given this Court's previously expressed view that "[a] request for attorney's fees should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), there is no basis to accept the Solicitor General's invitation to develop a new test for identifying "alter ego"

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[4] The cases cited by the Solicitor General (U.S. Br. 18) provide no guidance on how the Solicitor General's proposed inquiry would be conducted.

[5] *See also Brunswick Corp. v. Waxman*, 459 F. Supp. 1222, 1229 (E.D.N.Y. 1978) ("The circumstances under which a court should disregard the corporate fiction are not always clear and it is difficult, if not impossible, to formulate a precise and categorical definition applicable to all situations . . . each case being *sui generis*.") (citation omitted), *aff'd*, 599 F.2d 34 (2d Cir. 1979).

organizations. Rather, a bright-line standard allowing reasonable fees for all prevailing parties if the legal services were performed by an attorney furthers Congress' intent.

Second, in discussing section 1988's legislative history, respondents and amici misperceive the policies of the statute. They suggest that "Congress' main concern was with citizens who might be unable to assert their civil rights because they could not afford to hire attorneys to represent them in court" (Resp. Br. 17; *see also* U.S. Br. 21-24; Hawaii Br. 6). Focusing on this concern, respondents and amici suggest that application of the statute should be limited to "the traditional attorney-client relationship" (U.S. Br. 21).

The Congress that passed section 1988 undoubtedly was motivated in part by the desire to make civil rights litigation economically viable. But this concern is not limited to traditional attorney-client relationships. In the absence of attorney's fees, a pro se attorney might well have difficulty in employing another attorney to take his case pro bono (reflecting a prevailing attitude that pro bono services should be reserved to those unable to represent themselves). At the same time, if denied attorney's fees, the attorney might have inadequate resources to take time from his own practice to bring a civil rights claim. Thus, the very legislative concern cited by respondents and amici suports petitioner's position.

Moreover, while it is no surprise that the legislative history refers to clients—given that most civil rights litigants undoubtedly are non-lawyers represented by lawyers—it is a mistake to read such references as endorsing only "the traditional attorney-client relationship," involving "payment by a client to an attorney" (U.S. Br. 21). Congress clearly envisioned fee awards in contexts other than the typical attorney-client setting, as reflected in the statutory language (*see* p. 4, *supra*) and

as expressly reflected in the endorsement of fees if "a prevailing party is . . . represented by an organization or if the party is itself an organization." House Report at 8 n.16; *see also* Senate Report at 6. Thus, as this Court has repeatedly recognized, the nature—or even existence—of a paying relationship between an attorney and a prevailing party in a civil rights lawsuit is not relevant to a section 1988 fee award. *See Blanchard v. Bergeron*, 489 U.S. 87, 93-96 (1989) (contingent fee arrangement); *Blum v. Stenson*, 465 U.S. 886 (legal services provided pro bono).

More fundamentally, by looking solely to economic factors and the existence of an attorney-client relationship, respondents and their amici develop a cramped view of the statute, ignoring Congress' repeated emphasis that "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens." House Report at 1. The Committee Reports accompanying section 1988 make clear that Congress intended the statute to serve as an incentive to "private attorneys general" to vindicate civil rights, and wanted to involve competent counsel in the effort to uncover and remedy civil rights violations. *See* House Report at 8-9; Senate Report at 3-4. In particular, the Senate Report notes (Senate Report at 3) that "Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of [the] civil rights laws" and that, accordingly, "[m]odern civil rights legislation reflects a heavy reliance on attorneys' fees."

These themes were repeated during Senate debate on section 1988, with Senators noting that "Congress should encourage citizens to go to court in private suits to vindicate its policies and protect their rights," 122 Cong. Rec. 31,471 (1976) (statement of Sen. Scott); that section 1988 "lends substance to the private enforcement of rights" *id.* at 31,472 (statement of Sen. Kennedy); and that "Congress firmly intends that all our civil rights laws be vigorously enforced," *id.*

The legislative history therefore reflects that section 1988 has a broad purpose of "encourag[ing] successful civil rights litigation," and that "Congress implemented its purpose by broadly requiring" defendants to pay a reasonable attorney's fee to prevailing plaintiffs. *Blanchard v. Bergeron*, 489 U.S. at 94-95 (applying these purposes in holding that a contingent-fee agreement did not impose a limitation on the amount of fees recoverable under Section 1988); *see also* House Report at 5; *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam). These goals are equally served when fees are awarded to pro se attorneys or parties represented by counsel.

III. THE POLICY ARGUMENTS OFFERED BY RESPONDENTS AND THEIR AMICI FOR DENYING FEE AWARDS TO PRO SE ATTORNEYS ARE UNAVAILING

Perhaps recognizing that their other points are unconvincing, respondents and their amici offer a host of policy arguments that find no support in the language or history of the statute to justify denying fees to pro se attorneys. This unfocused list of objections presents nothing to override the statute's language, history, and underlying purposes.

First, respondents and their amici (Resp. Br. 21-22; U.S. Br. 26-27; Hawaii Br. 9-10) express concern with the conflicting motivations a pro se attorney may face, arguing, for example, that the attorney's interest in a fee award "may cause him to pursue marginal litigation" (U.S. Br. 27). Similarly, they worry (Resp. Br. 21; U.S. Br. 26) that pro se attorneys will lack the necessary "objectivity and detachment" and will, therefore, provide poor representation for civil rights plaintiffs. As discussed in petitioner's opening brief (Pet. Br. 16), the same concerns could be expressed with respect to organizations. But, in any event, the remedy is simple, and it is already provided in the statute. Section 1988 pro-

vides fees only for prevailing parties, thus ensuring that pro se attorneys will have no incentive to pursue fruitless litigation. To the contrary, in authorizing fees for prevailing defendants subjected to groundless civil rights lawsuits (House Report at 7), section 1988 gives pro se attorneys a *dis*incentive to pursue meritless litigation.[6]

It is also unpersuasive for respondents and their amici to profess such concern for the quality of advocacy by pro se attorneys. Neither respondents nor their amici cite any specific evidence to support the assertions that pro se attorneys will bring meritless litigation; the Solicitor General, for example, merely claims (U.S. Br. 26) that "[e]xperience has shown" pro se attorneys have such tendencies. The real concern of respondents and their amici is not that pro se attorneys will be ineffective, but rather that pro se attorneys will, as petitioner has, effectively enforce the civil rights laws and prevail in civil rights litigation. Hawaii's Attorney General and the Attorneys General of the twenty other states joining Hawaii's brief have found pro se attorneys so successful in identifying and litigating civil rights violations that they express concern (Hawaii Br. 2) that allowing fees for pro se attorneys will impose "potentially devastating costs" on their respective state treasuries. *Cf. Jones v. Lujan*, 883 F.2d at 1036 n.6 ("'[T]he pro se attorney's skills as an advocate will in all probability . . . serve to increase the level of competency by which claims are processed.'") (quoting factual finding by district court).

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[6] *See generally Jones v. Lujan*, 883 F.2d at 1036 ("Ethical and disciplinary considerations, concerns about incentives and the objectivity of pro se attorneys, and other practical matters will all be taken care of with the confines of [section 1988's] strictures, and pursuant to normal rules of conduct for counsel.") (footnote omitted); *Duncan v. Poythress*, 777 F.2d 1508, 1514 (11th Cir. 1985) (en banc) (noting that "a lawyer who brings a frivolous suit may be liable for defendants' attorney's fees under the standard set out by the Supreme Court in *Christiansberg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)"), *cert. denied*, 475 U.S. 1129 (1986).

In light of Congress' expresed intent to encourage civil rights lawsuits (pp. 8-9, *supra*), a concern that pro se attorneys will effectively enforce the civil rights laws obviously is not a basis to preclude pro se attorneys from receiving fee awards.

Second, amici profess (U.S. Br. 26-27; Hawaii Br. 10) great concern with the ethical quandaries that may face pro se attorneys. Specifically, both the Solicitor General and Hawaii's Attorney General point to EC 5-9 of the ABA's Model Code of Professional Responsibility, which indicates that the roles of an advocate and a witness generally are inconsistent. This conflict is more imagined than real. As the Solicitor General concedes, "there is authority that testimony by a pro se lawyer does not violate the rules of professional ethics" (U.S. Br. 26), and in many cases, as was true here, the attorney will not appear as a witness. In any event, it seems singularly inappropriate to deny attorneys' fees to lawyers proceeding pro se as a means of discouraging pro se appearances and thereby avoiding possible ethical problems. If there is any problem in this area it can and should be resolved by application of appropriate ethical rules, not by creating a blanket discouragement to pro se appearances by attorneys in a statute that does not even remotely address this ethical question.

Third, Hawaii's Attorney General (Hawaii Br. 6-8) suggests that awarding fees would "yield windfalls" for pro se attorneys, since many pro se attorneys would end up recovering greater hourly fees in their own cases than in cases on behalf of clients. This argument misunderstands established attorneys fees doctrine. Section 1988's legislative history expressly indicates (House Report at 8) that courts should calculate the amount of a fee award in accordance with the factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). *See also Blanchard v. Bergeron*, 489 U.S. at 91; *Hensley v. Eckerhart*, 461 U.S. at 429-30 n.3. These factors include "[t]he preclu-

sion of other employment," the typical rates charged by the applicant, and "[t]he experience, reputation, and ability of the attorneys." *See Johnson*, 488 F.2d at 718. Thus, far from producing a windfall, a section 1988 fee award would be adjusted in accordance with the particular characteristics of the pro se attorney involved. The only possible windfall involved here is the windfall that civil rights defendants will receive by escaping liability for a fee award because the plaintiffs uncovering the defendants' civil rights violations happen to be pro se attorneys.

Fourth, in an apparent effort to avoid resolution of the central question on which this Court granted certiorari, amici argue (U.S. Br. 13 n.6; Hawaii Br. 2-3) that petitioner in this particular case must be treated as a non-lawyer since he was not admitted to the bar of the United States District Court for the Eastern District of Kentucky, the court in which his constitutional challenge to Kentucky's elections laws was filed. This argument is meritless. Congress did not condition the award of attorneys' fees upon a particular form of compliance with local rules. Here petitioner was specifically authorized to appear because pro hac vice admission is unnecessary for pro se litigants. *See* E.D. Ky. Local R. 3(c). It is also quite clear that he could have been admitted pro hac vice in any event. Petitioner is a licensed attorney, in good standing, of the bar of the State of Florida and is admitted to the bars of the Sixth Circuit and this Court. In any event, as the Solicitor General concedes (U.S. Br. 13 n.6), respondents never made this argument below or in their brief in opposition to certiorari, and it was not a basis for either the District Court's or the Sixth Circuit's ruling. Accordingly, respondents have waived the point, and it is an inappropriate basis on which to decide this case. *See* Sup. Ct. R. 15.1.

Finally, the Solicitor General (U.S. Br. 27-28) raises a concern with the "seemliness" of treating pro se attorneys differently from other pro se litigants. This argument is groundless. Congress itself drew precisely this line by authorizing only "attorney's" fees, and that line was fully justified in view of the important distinction between non-lawyers and lawyers: only the latter have specialized legal training. Virtually every court that has awarded fees to pro se lawyers has made it clear that pro se non-lawyers are ineligible for fees. *See, e.g., Duncan v. Poythress*, 777 F.2d 1508, 1510 & n.6 (11th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1129 (1986); *Rybicki v. State Bd. of Elections*, 584 F. Supp. 849, 859 (N.D. Ill. 1984) (three judge court). If it were indeed unseemly to make such a distinction, the logical solution is not to prohibit pro se lawyers from recovering fees, but to urge Congress to authorize fees for non-lawyers as well, a result supported by several commentators. *See, e.g.*, Note, *Awarding Attorney's Fees to Prevailing Pro Se Litigants*, 80 Mich. L. Rev. 1111 (1982); Note, *Attorney Fees, Freedom of Information, and Pro Se Litigants: Per Se Prohibitions Frustrate Policies*, 26 Wm. & Mary L. Rev. 349 (1985).

CONCLUSION

For the foregoing reasons and those presented in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 22, 1991

(7)

No. 90-79

Supreme Court, U.S.
FILED
DEC 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD B. KAY, PETITIONER

v.

BREMER EHRLER AND THE
KENTUCKY BOARD OF ELECTIONS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a lawyer who litigates an action pro se is eligible for an award of attorney's fees under 42 U.S.C. 1988.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents the question whether a lawyer who litigates an action pro se is eligible for an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, 42 U.S.C. 1988.[1] The Court's resolution

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[1] Section 1988 provides in part:

> In in any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

of this question is likely to affect the liability of the United States for attorney's fees under several important federal fee-shifting statutes, including the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, the Freedom of Information Act (FOIA), 5 U.S.C. 552(a)(4)(E), and the Privacy Act of 1974, 5 U.S.C. 552a(g)(3)(B). See, *e.g.*, *Poythress* v. *Kessler*, 475 U.S. 1129, 1130 (1986) (Burger, C.J., joined by White, J., dissenting from the denial of certiorari) ("[T]he award of fees under § 1988 and under [FOIA] have much in common."). See also Pet. Br. 19 n.8 ("The interpretation of section 1988 could have farreaching implications for many other fee-shifting statutes * * *.").

The United States and federal agencies also are subject to attorney's fee awards under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). Title VII and Section 1988 "authorize fee awards in identical language, and Congress acknowledged the close connection between the two statutes when it approved § 1988." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 758 n.5 (1980) (citing S. Rep. No. 1011, 94th Cong., 2d Sess. 2-6 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 5-8 (1976)). In addition, a claim against the government for attorney's fees under Section 1988 is now before a court of appeals. *Lawrence* v. *Bowsher*, No. 84-5443 (D.C. Cir., argued Sept. 14, 1990).

The United States has a substantial interest in the interpretation and application of the federal civil rights laws, including Section 1988. Because we believe that fee awards to pro se litigants, including pro se lawyers, are inconsistent with the language and goals of Section 1988, we agree with the court of appeals that petitioner is not eligible for an award of attorney's fees in this case.

STATEMENT

1. Petitioner is licensed to practice law in the State of Florida.[2] He has sought the nomination of the Democratic Party for President of the United States—unsuccessfully—on several occasions. In December 1987, petitioner wrote to the Secretary of State of Kentucky requesting that his name be placed on the ballot in Kentucky's 1988 presidential primary. The Secretary referred petitioner's request to the Kentucky Board of Elections. The Board denied the request because it concluded that petitioner was not a "generally advocated and nationally recognized" candidate. Pet. App. 3a; see Ky. Rev. Stat. Ann. § 118.581 (1982 & 1989 Supp.)

2. Petitioner, proceeding pro se, brought an action in the United States District Court for the Eastern District of Kentucky, asserting that Kentucky's statutes governing presidential primaries violated his constitutional rights. Petitioner sought a declaration that two of the Kentucky statutes are unconstitutional, an injunction requiring the State to place his name on the primary ballot, and an order directing the State to refund the $1,000 "candidates' deposit" required by Kentucky law. See Ky. Rev. Stat. Ann. § 118.611 (1982 & 1989 Supp.). In an earlier pro se action arising from petitioner's efforts to obtain a

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[2] Although not reflected in the record of this case, it is a matter of public record that petitioner is not a member of the Kentucky Bar or the Bar of the United States District Court for the Eastern District of Kentucky, the court in which this case was litigated. Nor did petitioner file a motion for admission *pro hac vice* in this action. Accordingly, as discussed more fully below, see note 6, *infra*, petitioner's status before the trial court was no different from that of a non-attorney pro se litigant.

place on the Kentucky presidential primary ballot in 1980, the court held unconstitutional a prior Kentucky statute with language identical to that of Ky. Rev. Stat. Ann. § 118.581. See *Kay* v. *Mills*, 490 F. Supp. 844 (E.D. Ky. 1980). Pet. App. 1a-3a.

Two days after petitioner filed his action, the newly installed Secretary of State of Kentucky notified petitioner that the Board of Elections had agreed to place his name on the primary ballot. Although this rendered his request for injunctive relief moot, petitioner proceeded with the remainder of his action. Following discovery, both sides moved for summary judgment. Pet. App. 2a.

3. The district court referred the matter to a magistrate, who recommended that the district court grant petitioner most of the relief he sought on the merits. The magistrate agreed with petitioner that the case was not moot. Pet. App. 20a-21a. On the merits, the magistrate concluded that the statutory provision requiring primary candidates to be "generally advocated and nationally recognized" is unconstitutionally vague, and rejected the State's argument that the constitutional problem was cured by the Election Board's limiting interpretation of the statutory language. *Id.* at 21a-23a. The magistrate also concluded that requiring primary candidates to forfeit a $1,000 deposit if the candidate fails to receive at least 3% of the primary vote places an unconstitutional burden on unpopular candidates in violation of the Equal Protection Clause. *Id.* at 23a-26a. The magistrate agreed with respondents, however, that petitioner's state law claims should be dismissed for lack of subject matter jurisdiction. *Id.* at 26a-27a.

The magistrate recommended that petitioner be awarded his litigation costs, but not an attorney's

fee. Pet. App. 27a-28a. The magistrate noted that the court of appeals had held that pro se lawyers are not entitled to attorney's fees under FOIA, *Falcone* v. *IRS*, 714 F.2d 646 (6th Cir. 1983), cert. denied, 466 U.S. 908 (1984), and concluded that the court of appeals was unlikely to reach a different result under Section 1988.

The district court held that "[t]he Magistrate's analysis and conclusion on [the attorney's fee] issue is correct in all respects, and the court hereby adopts same." Pet. App. 16a.

4. The court of appeals affirmed. Pet. App. 1a-11a. It observed that most courts of appeals have held that Section 1988 does not authorize attorney's fee awards to pro se non-lawyers. The courts have reasoned that Section 1988 " 'presupposes a relationship of attorney and client' that does not exist when the plaintiff proceeds *pro se*." Pet. App. 5a (quoting *Davis* v. *Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (per curiam)). The court of appeals agreed that "the 'plain language' of a statutory provision for attorney's fees assumes a paying relationship between an attorney and a client." Pet. App. 8a. Although the court recognized that two courts of appeals and two district courts have held that pro se lawyers—unlike other pro se litigants—may recover fees under Section 1988, the court also looked to decisions under other federal fee-shifting statutes denying fees to lawyers who litigate pro se.

In particular, the court noted that it had held in *Falcone* v. *IRS*, *supra*, that pro se lawyers are not eligible for attorney's fees under FOIA. The court observed that one purpose of fee-shifting provisions is "to encourage potential claimants to seek legal advice before commencing litigation," because "reten-

tion of legal counsel might help to prevent unnecessary litigation." 714 F.2d at 647. When an attorney represents himself, however, "this filtering does not occur." Pet. App. 7a. The court also said in *Falcone* that allowing pro se lawyers to recover attorney's fees might lead to "the establishment of a 'cottage industry' of inactive lawyers who would support themselves on statutory fee awards for self-generated litigation." *Ibid.* The court in *Falcone* concluded that, in enacting FOIA, Congress did not intend to "subsidize attorneys without clients." 714 F.2d at 648. Instead, "[b]oth a client and an attorney are necessary ingredients for an award of fees." *Ibid.*

The court of appeals found that its reasoning under FOIA applies in the context of Section 1988 as well. Here, as in *Falcone*, the court concluded that the plain language of the statute precludes an award of attorney's fees to pro se lawyers. In addition, a pro se litigant's "opportunity costs" are not the kind of costs that can be recovered under Section 1988. Even "[a]ssuming that [petitioner] spent hours prosecuting this case that he could have billed to clients, he has only failed to add to the wealth of his private practice. He has not incurred any expenses for legal representation, and, therefore, he cannot recover under section 1988." Pet. App. 8a. In addition, a pro se lawyer lacks the objectivity necessary to evaluate the merits of potential civil rights claims. Consequently, encouraging pro se litigation would frustrate one of the purposes of the statute.

Judge Jones dissented. Pet. App. 9a-11a. In his view, *Falcone* recognized that allowing pro se litigants to recover their opportunity costs would raise difficult problems of proof, but did not foreclose such recoveries. Judge Jones concluded that Section 1988,

unlike FOIA, is intended to encourage lawyers "to search for violations of constitutional and statutory rights and to vindicate those rights." Pet. App. 10a (quoting *Duncan* v. *Poythress*, 777 F.2d 1508, 1515 (11th Cir. 1985), cert. denied, 475 U.S. 1129 (1986)). Because Section 1988 "not only relieves the burden of litigation, but also rewards successful litigants for vindicating a constitutional right," Pet. App. 10a, Judge Jones said that concerns about objectivity and a possible "cottage industry of fee-generating lawyers" are not as serious as under FOIA. *Ibid.*

SUMMARY OF ARGUMENT

1. The plain language of Section 1988 precludes awards of attorney's fees to pro se lawyers. As petitioner concedes (Pet. Br. 9-10 n.4), the language of Section 1988 requires the involvement of a "licensed attorney." The ordinary meaning of "attorney" is a person who is both (1) licensed to practice law and (2) acting as the agent or representative of a client. It is a basic principle of agency law that one cannot be one's own agent. Consequently, a pro se lawyer cannot function as his own attorney, any more than he can be his own friend.

The statutory phrase "attorney's fee" reinforces the ordinary meaning of "attorney." A pro se lawyer cannot provide himself with a "fee" in the sense of compensation for service. Petitioner rests much of his case on the argument that (1) "organizational plaintiffs" do not pay legal fees, (2) Congress intended to allow "organizational plaintiffs" to recover attorney's fees under Section 1988, and (3) organizational plaintiffs are indistinguishable from pro se lawyers. This argument, which rests on legislative

history rather than statutory language, is unconvincing. Although petitioner is correct that organizational plaintiffs (as well as lawyers representing clients *pro bono publico*) have been allowed to recover attorney's fees under Section 1988, those cases are not the same as that of a pro se lawyer. An organization can act only through its agents. Thus, litigation on behalf of an organizational plaintiff always involves an attorney-client relationship. In contrast, pro se litigation never involves such a relationship. Petitioner's practical objections to the requirement that prevailing parties show the existence of an attorney-client relationship as a prerequisite to a fee award are not well taken.

In addition, the "opportunity costs" of a pro se litigant are not "a part of costs" in the usual sense of that phrase. Nor is there any meaningful distinction between the "opportunity costs" of pro se lawyers and the opportunity costs of other pro se litigants who are not permitted to recover attorney's fees.

2. a. Although the Court need not resort to legislative history to construe clear statutory language, the legislative history of Section 1988 contains numerous statements indicating that Congress used "attorney's fee" in the usual sense of a lawyer's fee for representing a client. Petitioner ignores these statements and focuses instead on the status of organizational plaintiffs. Because organizational plaintiffs act only through their agents, there is no basis for petitioner's contention that Congress must have intended to treat pro se lawyers like organizations.

b. Awarding attorney's fees to pro se lawyers would frustrate rather than further the goals of Section 1988. In enacting Section 1988, Congress plainly did not intend to encourage pro se litigation;

there is no reason to conclude that Congress intended to encourage pro se litigation by lawyers. The familiar adage that "a lawyer who represents himself has a fool for a client" is based on long experience with pro se litigation. A pro se lawyer lacks professional detachment and objectivity. In addition, it is unlikely that Congress meant to encourage lawyers to entangle themselves in the ethical problems that may arise from pro se litigation.

There is little risk that denying fees to pro se lawyers will restrict their access to the judicial process or inhibit the filing of meritorious civil rights actions. The rule adopted by the court of appeals simply places lawyers on the same footing as all other citizens; lawyers are at least as capable of obtaining legal representation as other plaintiffs. In addition, a rule that favors pro se lawyers over all other pro se litigants has at least the appearance of unfairness. All pro se litigants expend time and energy on litigation; all "prevailing parties" have achieved success in the litigation. Public respect for lawyers and judges would not be enhanced by a rule that appears to favor the economic welfare of lawyers over other litigants.

ARGUMENT

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, does not authorize awards of attorney's fees to pro se litigants, including pro se lawyers. The courts of appeals have held, in an overwhelming majority of cases, that non-lawyer pro se litigants are not eligible for attorney's fee awards under Section 1988 or other federal fee-shifting statutes.[3] Petitioner himself concedes that construing Section 1988 to permit pro se non-lawyers to recover attorney's fees would "push the [statutory] language too far." Pet. Br. 9-10 n.4. Although petitioner is correct on this point, he is incorrect in contending that a pro se litigant's eligibility for an attorney's fee award depends solely on the party's qualifications to practice law. The language of the statute, its legislative history, and the policies underlying Section 1988 point to the conclusion that all pro se litigants, whether lawyers or not, are ineligible for awards of attorney's fees.[4]

[3] See *Naekel* v. *Dep't of Transportation*, 845 F.2d 976, 978-981 (Fed. Cir. 1988) (EAJA); *Gonzalez* v. *Kangas*, 814 F.2d 1411, 1411-1412 (9th Cir. 1987) (Section 1988); *Clarkson* v. *IRS*, 811 F.2d 1396, 1397 n.2 (11th Cir.) (Privacy Act), cert. denied, 481 U.S. 1031 (1987); *Merrell* v. *Block*, 809 F.2d 639, 641-642 (9th Cir. 1987) (EAJA); *Crooker* v. *EPA*, 763 F.2d 16, 17 (1st Cir. 1985) (EAJA); *DeBold* v. *Stimson*, 735 F.2d 1037, 1041-1043 (7th Cir. 1984) (FOIA); *Redding* v. *Fairman*, 717 F.2d 1105, 1120 (7th Cir. 1983) (Section 1988), cert. denied, 465 U.S. 1025 (1984); *Wolfel* v. *United States*, 711 F.2d 66, 67-68 (6th Cir. 1983) (FOIA); *Turman* v. *Tuttle*, 711 F.2d 148 (10th Cir. 1983) (Section 1988); *Pitts* v. *Vaughn*, 679 F.2d 311, 312-313 (3d Cir. 1982) (Section 1988); *Wright* v. *Crowell*, 674 F.2d 521, 522 (6th Cir. 1982) (per curiam) (Section 1988); *Cunningham* v. *FBI*, 664 F.2d 383, 384-387 (3d Cir. 1981) (FOIA); *Barrett* v. *Bureau of Customs*, 651 F.2d 1087, 1088-1090 (5th Cir. 1981) (FOIA), cert. denied, 455 U.S. 950 (1982); *Cofield* v. *City of Atlanta*, 648 F.2d 986, 987-988 (5th Cir. 1981) (Section 1988); *Lovell* v. *Snow*, 637 F.2d 170, 171 (1st Cir. 1981) (Section 1988); *Crooker* v. *United States Dep't of Justice*, 632 F.2d 916, 920-922 (1st Cir. 1980) (FOIA); *Davis* v. *Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (per curiam) (Section 1988); *Burke* v. *United States Dep't of Justice*, 559 F.2d 1182 (10th Cir. 1977), aff'g 432 F. Supp. 251, 253 (D. Kan. 1976). The Second Circuit has denied fees to pro se non-lawyers, but has left open the possibility that such litigants might be entitled to recover fees if the litigation caused them to forgo income. *Kuzma* v. *Postal Service*, 725 F.2d 16, 17, cert. denied, 469 U.S. 831 (1984). Only the D.C. Circuit has allowed fees to pro se non-lawyers. *Cox* v. *United States Dep't of Justice*, 601 F.2d 1, 5-6 (1979) (FOIA). And even the D.C. Circuit has not extended this ruling to all fee-shifting provisions. See *Jones* v. *Lujan*, 883 F.2d 1031, 1035 (1989) ("There can be no real doubt that EAJA requires that the attorney be trained in the *law*.").

[4] Petitioner's assertion (Pet. Br. 9) that "the great weight of authority" supports attorney's fee awards to pro se lawyers is an overstatement. Three courts of appeals have held that pro se lawyers are not eligible for fees under federal fee-shifting statutes. *Aronson* v. *HUD*, 866 F.2d 1, 4-6 (1st Cir. 1989) (FOIA); *Falcone* v. *IRS*, 714 F.2d 646, 647-648 (6th Cir. 1983) (FOIA), cert. denied, 466 U.S. 908 (1984); *White* v. *Arlen Realty & Dev. Corp.*, 614 F.2d 387, 388-389 (4th Cir.) (Truth in Lending Act), cert. denied, 447 U.S. 923 (1980). Four court of appeals have held to the contrary. *Duncan* v. *Poythress*, 777 F.2d 1508 (11th Cir. 1985) (en banc) (Section 1988), cert. denied, 475 U.S. 1129 (1986); *Cazalas* v. *United States Dep't of Justice*, 709 F.2d 1051 (5th Cir. 1983) (FOIA); *Ellis* v. *Cassidy*, 625 F.2d 227, 230-231 (9th Cir. 1980) (Section 1988); *Cuneo* v. *Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977) (FOIA). See also *Jones* v. *Lujan*, 883 F.2d 1031 (D.C. Cir. 1989) (EAJA). The Ninth Circuit's position is not entirely clear, however, because in *Ellis* v. *Cassidy* "the *pro se* lawyers were defendants, not plain-

I. THE LANGUAGE OF SECTION 1988 PRECLUDES AWARDS OF ATTORNEY'S FEES TO PRO SE LITIGANTS, INCLUDING PRO SE LAWYERS

"'In determining the scope of a statute, we look first to its language,' giving the 'words used' their 'ordinary meaning.'" *Moskal* v. *United States*, No. 89-964 (Dec. 3, 1990), slip op. 4 (quoting *United States* v. *Turkette*, 452 U.S. 576, 580 (1981); *Richards* v. *United States*, 369 U.S. 1, 9 (1962)). The relevant language of Section 1988 provides that, in an action or proceeding under specified civil rights statutes, the court may award a prevailing party "a reasonable attorney's fee as part of the costs" of the action. See note 1, *supra*. An award of attorney's fees to a lawyer litigating pro se is inconsistent with the ordinary meaning of "attorney," "attorney's fee," and "costs." [5]

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tiffs" and "[t]his weighed heavily in the court's decision awarding fees." *Aronson* v. *HUD*, 866 F.2d at 5.

The federal trial courts are also divided. Compare *Frisch* v. *Commissioner*, 87 T.C. 838, 841-846 (1986) (no fees under 26 U.S.C. 1430(c)(1)(A)) and *Lawrence* v. *Staats*, 586 F. Supp. 1375 (D.D.C. 1984) (no fees under Section 1988) with *Lanasa* v. *City of New Orleans*, 619 F. Supp. 39 (E.D. La. 1985) (fees under Section 1988) and *Rybicki* v. *State Bd. of Elections*, 584 F. Supp. 849 (N.D. Ill. 1984) (same).

[5] The leading opinion holding that pro se lawyers are eligible for fees under Section 1988 simply asserts, without discussion, that "the plain language of section 1988 does not preclude an award of fees to a lawyer representing herself." *Duncan* v. *Poythress*, 777 F.2d at 1511. For the reasons stated below, this is not so. In any event, the Eleventh Circuit—unlike petitioner—candidly recognized that the language of Section 1988 does not require fees awards to pro se lawyers, but at most permits such awards.

A. The Ordinary Meaning of "Attorney" Does Not Describe a Pro Se Lawyer

Petitioner concedes that the plain language of Section 1988 requires the involvement of a "licensed attorney." Pet. Br. 9-10 n.4. Petitioner then asserts, without argument, that he is a licensed attorney, and that therefore the language of the statute requires that he be awarded attorney's fees.[6] Pet. Br. 10. Petitioner's conclusion does not follow from his premise. The fact that a pro se litigant is licensed to practice law does not imply that he is his own "attorney." On

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[6] The courts below held that pro se lawyers are not entitled to attorney's fees, and therefore had no occasion to address the sufficiency of petitioner's legal qualifications. In fact, petitioner is not admitted to the Kentucky Bar or the Bar of the United States District Court for the Eastern District of Kentucky. Nor did he seek to be admitted to practice *pro hac vice* in this case. See note 2, *supra*. These facts were not noted in the petition for certiorari. Although the matter was not raised in Kentucky's brief in opposition to the petition for certiorari, and so may be considered waived under Rule 15.1 of the Rules of this Court, the fact that a lawyer is not admitted to the bar of a federal district court is a matter of public record of which this Court may take judicial notice. See *National Leasing Corp.* v. *Williams*, 80 F.R.D. 416, 418 (W.D. Pa. 1978) (taking judicial notice that lawyer is a member of district court bar). Because petitioner was not entitled to practice law in the district court, he is not eligible for an award of attorney's fees in any event. Even if pro se lawyers are entitled to attorney's fees under Section 1988, it is not sufficient that the pro se litigant is licensed to practice law in another jurisdiction (or was graduated from law school, or has some legal training). The litigant must be admitted to practice in the court where the action is brought. See *Hannon* v. *Security Nat'l Bank*, 537 F.2d 327 (9th Cir. 1976) (pro se law school graduate not yet licensed to practice law treated as non-attorney). See also *Jones* v. *Lujan*, 883 F.2d at 1037 (Silberman, J., concurring).

the contrary, the word "attorney" ordinarily refers to a person who is (1) licensed to practice law, and (2) acts as the agent or representative of clients. The ordinary meaning of "attorney" comprises both of these elements. See, *e.g.*, *Savings Bank* v. *Ward*, 100 U.S. 195, 199 (1879) ("Persons acting professionally in legal formalities, negotiations or proceedings *by the warrant or authority of their clients* may be regarded as attorneys-at-law within the meaning of that designation as used in this country.") (emphasis added). Indeed, the second element predates the first. "Attorney" originally meant simply a substitute or agent, and this original meaning survives in phrases such as "power of attorney" and "attorney in fact."[7] Judge Roney has observed that

> without exception [two dozen dictionaries] define the word "attorney" in terms of one who acts for *another*, someone who is employed as an agent to represent *another*, someone who acts at the appointment of *another*.

Duncan v. *Poythress*, 777 F.2d at 1517-1518 (dissenting opinion).[8]

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[7] "Attorney" is derived from the Old French word "atourné," which meant "one appointed or constituted," and is related to the word "attorn," which means "[t]o turn over to another; to assign." 1 *Oxford English Dictionary* 553 (1933).

[8] See, *e.g.*, 1 *Oxford English Dictionary* 553 (1933) ("attorney" is "[o]ne appointed or ordained to act for another"); *Webster's Third New International Dictionary* 141 (1986) ("one who is legally appointed by another to transact business for him; *specif*: a legal agent qualified to act for suitors and defendants in legal proceedings"); *Webster's New International Dictionary, Second Edition* 179 (1950) (same). *Black's Law Dictionary* 128 (6th ed. 1990), after stating that "[i]n the most general sense ['attorney'] denotes an agent or substitute," and "["i]n its most common usage * * * means 'attorney at law', 'lawyer' or 'counselor at law,'" adds that "'attorney' includes a party prosecuting or defending an action in person." In support of the latter statement, the dictionary cites Section 105(c) of the New York Civil Practice Law and Rules (McKinney 1990). The fact that a State has chosen to enact a statute departing from the ordinary meaning of "attorney" does not alter the ordinary meaning of that word, and may in fact reinforce it.

It is a basic principle of agency law that one cannot be one's own agent. See Restatement (Second) of Agency § 1 (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another * * *."); 2A C.J.S. *Agency* § 27, at 592 (1972) ("There is no agency unless one is acting for and in behalf of another, since a man cannot be the agent himself."). Consequently, "the terms 'pro se' and 'attorney' are mutually exclusive." *Duncan*, 777 F.2d at 1518 (Roney, J., dissenting). A pro se litigant, whether trained in the law or not, cannot be his own "attorney," any more than he can be his own friend.[9] In short, "Congress did not use 'attorney' to mean 'something other than a lawyer,' * * *. Instead, Congress meant something *more* than a lawyer; it meant a lawyer acting as a legal repre-

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[9] In the Act of Feb. 26, 1853, ch. 80, 10 Stat. 161, after listing fees that could be taxed by the federal courts, Congress provided that "this act shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving *from their clients* * * * compensation for their services * * *." (Emphasis added). In *Gorse* v. *Parker*, 36 F. 840, 841 (N.D. Ill. 1888), the court said that "where a party is obliged by reason of his unfamiliarity with proceedings in courts to employ an attorney or solicitor, the law gives him this fee to aid in compensating his attorney; but if a party is not obliged to resort to a lawyer for assistance, then the allowance is not recoverable."

sentative or attorney for another." *Jones* v. *Lujan*, 883 F.2d at 1037 (Silberman, J., concurring in the result).[10]

B. The Ordinary Meaning of "Attorney's Fee" Does Not Apply to Pro Se Litigation

The statutory phrase "attorney's fee" reinforces the conclusion that Congress used "attorney" in the usual sense of a lawyer acting as the representative of a client. Of course a pro se lawyer does not actually charge himself a "fee" in the ordinary sense of "recompense for an official or professional service." *Black's Law Dictionary* 614 (6th ed. 1990). And even if he did, this would not alter the reality that lawyer and client are one and the same person. Cf. *Handfield* v. *Commissioner*, 23 T.C. 633, 638-639 (1955) (sole proprietor may not deduct as business expense the salary he "paid" himself).

Petitioner rests much of his argument on the contention that "organizational litigants" (such as the plaintiffs in *Alyeska Pipeline Serv. Corp.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975)), do not pay legal

[10] Consideration of other areas of law further demonstrates that a lawyer who undertakes to represent himself is not acting as his own "attorney." For example, a pro se lawyer could not successfully claim the attorney-client privilege on the ground that he is licensed to practice law and "communicated" with himself for the purpose of obtaining his own legal advice. Similarly, this Court has held that a nonlawyer criminal defendant who elects to proceed pro se is not entitled to pursue a claim for ineffective assistance of counsel. *McCaskle* v. *Wiggins*, 465 U.S. 168, 177-178 n.8 (1984). The result would be no different if the defendant were licensed to practice law. Nor could a pro se lawyer with malpractice coverage sue himself for malpractice and recover from his insurance carrier.

fees, and that organizations are "indistinguishable from pro se attorneys." Pet. Br. 12-18. It is true that public service organizations have been permitted to collect fees under Section 1988 for work performed by in-house lawyers. See, *e.g.*, *Blum* v. *Stenson*, 465 U.S. 886, 894 (1984). And law firms have been allowed to recover fees for work undertaken *pro bono publico*. See, *e.g.*, *Cornella* v. *Schweiker*, 728 F.2d 978, 986-987 (8th Cir. 1984); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1244-1246 (3d Cir. 1977).

As an initial matter, petitioner does not attempt to rest his argument about the status of organizational plaintiffs on the plain meaning of "attorney's fee," but rather relies on legislative history indicating that Congress intended to authorize awards to such plaintiffs.[11] Consequently, petitioner's argument has force only if pro se lawyers and organizational plaintiffs truly are indistinguishable. But petitioner's assertion to that effect is simply false. An organization, unlike an individual, acts only through human agents. See *Upjohn Co.* v. *United States*, 449 U.S. 383, 390 (1981) (corporation "an inanimate entity"). Thus, an organization cannot proceed "pro se." Litigation on behalf of an "organizational plaintiff," unlike litigation by a pro se lawyer, necessarily involves an agency relationship between an attorney and the or-

[11] See *Blanchard* v. *Bergeron*, 489 U.S. 87, 91-92 & n.6 (1989) (discussing legislative history). In particular, the Senate Report stated that "the appropriate standards" were "correctly applied" in *Davis* v. *County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974). S. Rep. No. 1011, *supra*, at 6. In *Davis*, "the court permitted a fee award to counsel in a public interest firm which otherwise would have been entitled to no fee." 489 U.S. at 93.

ganizational client.[12] In addition, in-house lawyers generally are compensated for their services, although their compensation may take the form of a salary rather than an hourly fee. Consequently, petitioner's contention that this case cannot be distinguished from cases involving organizational plaintiffs is unpersuasive.

Petitioner, having asserted that organizational litigants are "indistinguishable" from pro se lawyers (Pet. Br. 12), contradicts his assertion by conceding (*id.* at 27) that the existence of an attorney-client relationship "could serve to distinguish pro se attorneys from organizational litigants." Petitioner attempts to minimize the consequences of this (necessary) concession by suggesting that such a distinction "would enmesh the courts in a case-by-case assessment of the attorney-client relationship, lead to inappropriate line-drawing, and invite evasion." *Ibid.* Petitioner's concerns are exaggerated.

First, there is no basis for the suggestion that courts are ill-suited to determine the existence *vel non* of an attorney-client relationship, or that this is a particularly difficult judicial inquiry. Courts routinely decide this question in a variety of legal contexts—for example, in determining whether a lawyer is subject to the obligations owed to clients, see, *e.g.*, *Telectronics Proprietary, Ltd.* v. *Medtronic, Inc.*, 836 F.2d 1332, 1336-1339 (Fed. Cir. 1988); whether the attorney-client privilege is applicable, see, *e.g.*, *In re Grand Jury Subpoenas*, 803 F.2d 493, 499 (9th Cir. 1986); and whether notice to an attorney binds a particular client, cf. *Irwin* v. *Veterans Administration*, No. 89-5867 (Dec. 3, 1990), slip op. 3. Second, requiring an

[12] Similarly, a lawyer who litigates *pro bono publico* nevertheless functions as the agent for a client.

attorney-client relationship as a prerequisite for an award of attorney's fees is appropriate and consistent with the ordinary meaning of "attorney." Nor do we agree that requiring plaintiffs to show an attorney-client relationship as a prerequisite to a fee award would invite evasion. Lawyers representing bona fide organizations are eligible for fee awards, but organizations that are no more than the lawyer's alter ego do not transform a pro se lawyer into an attorney.

C. The Ordinary Meaning of "Costs" Does Not Include the "Opportunity Costs" of Pro Se Litigants

Section 1988 provides for an award of attorney's fees "as a part of costs." The time expended by pro se litigants on the litigation is not a part of their "costs" in the usual sense of that word.[13] It is true that a pro se lawyer, like other pro se litigants, may forgo other opportunities to earn income. But there is no indication that Congress intended to use the word "costs" to include "opportunity costs." Moreover, as discussed more fully below, see p. 28, *infra*, all pro se litigants incur "opportunity costs." The fact that pro se lawyers incur such costs does not distinguish them from other pro se litigants who petitioner concedes are excluded from attorney's fee awards by the plain language of the statute.

In sum, the plain language of Section 1988 providing for "an award of attorney's fees, as a part of costs" does not authorize a fee award to a pro se litigant, even if the litigant is licensed to practice law. The pro se lawyer is not an "attorney" in the

[13] Of course, a pro se litigant is entitled to recover filing fees and other recognized costs, and petitioner was awarded such costs in this case. See Pet. App. 16a-17a.

proceeding in the usual sense of that term, nor does he incur "attorney's fees" as "costs." Because petitioner's position is inconsistent with the plain meaning of the statute, his reliance on *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), for the proposition that Section 1988 must be construed broadly in favor of fee awards (see Pet. Br. 7, 11, 12) is misplaced. The language of Section 1988, even construed broadly in favor of prevailing parties, simply does not support the result petitioner argues for in this case.[14]

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[14] The court of appeals' reading of Section 1988 is reinforced by the language of 28 U.S.C. 1924, which provides:

> Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

The language of Section 1924 indicates that "the party claiming any item of cost" and "his duly authorized attorney or agent" are not the same person, that costs must have been "incurred," and that fees must have been "charged." None of these conditions is met in the case of a pro se lawyer.

Similarly, 28 U.S.C. 2412(a), which governs awards of costs against the United States, provides that "[a] judgment for costs against the United States shall * * * be limited to reimbursing * * * the prevailing party for the costs incurred by such party in the litigation."

II. THE LEGISLATIVE HISTORY OF SECTION 1988 INDICATES THAT CONGRESS INTENDED TO LIMIT ATTORNEY'S FEE AWARDS TO ATTORNEYS WITH CLIENTS

"'Absent a clearly expressed legislative intention to the contrary,' the words of the statute are conclusive." *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 310 (1989) (quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). This is not one of the "rare cases [in which] the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). On the contrary, the legislative history confirms that Congress intended to use the phrase "attorney's fee" in its ordinary sense, as a payment by a client to an attorney.

A. In Enacting Section 1988, Congress Intended to Authorize Fee Awards to Parties Represented by Attorneys

The legislative history contains several indications that Congress intended that the phrase "attorney's fee" refer to the traditional attorney-client relationship. The Senate Report states:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, * * * then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976). The Senate Report also states that attorney's fee awards

under the new legislation should be "adequate to attract competent counsel, but * * * not produce windfalls to attorneys." *Id.* at 6.

The House Report discloses a similar intent:

> Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [the bill] is designed to give such persons effective access to the judicial process * * *.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). In addition, one of the factors that Congress intended to be applied in determining the amount of the fee, see *Hensley* v. *Eckerhart*, 461 U.S. 424, 429-430 (1983), concerns "the nature and length of the professional relationship with the client," *id.* at 430 n.3.

The debates on the bill that became Section 1988 provide further evidence that Congress intended to provide fees to clients who hire attorneys. Senator Tunney, the sponsor of the legislation, stated that its purpose and effect was "to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil right statutes." 121 Cong. Rec. S14,975 (daily ed. Aug. 1, 1975).[15] Senator Bumpers agreed that "the inability

[15] The debates are *reprinted in* Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess., *Civil Rights Attorney's Fee's Awards Act of 1976* (Comm. Print 1976) [hereinafter *Sourcebook*].

Awards of attorney's fees to pro se lawyers are not a "traditional remedy." Nowhere in this Court's lengthy survey of the history of fee awards in the United States in *Alyeska Pipeline Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975), is there even a suggestion that pro se litigants, whether or not trained in the law, traditionally have been awarded attorney's fees. Although a small number of States have awarded fees to pro se lawyers (see Pet. Br. 13 n.6 (citing cases)), others have refused to award such fees. See *Connor* v. *Cal-Az Properties, Inc.*, 137 Ariz. 53, 668 P.2d 896 (Ct. App. 1983) (denying attorney's fee to pro se lawyer); *Hamer* v. *Lentz*, 547 N.E.2d 191 (Ill. 1989) (same); *Cheney* v. *Ricks*, 168 Ill. 533, 48 N.E. 75 (1897) (same); *Westenberger* v. *Bernard*, 160 So.2d 312 (La. Ct. App. 1964) (same); *Vanhooser* v. *Cunningham*, 24 Tenn. App. 480, 146 S.W.2d 840 (1940) (same). In any event, petitioner concedes (Pet. Br. 13) that in 1853 "Congress severed the link between federal practice and state law."

to pay for an attorney" should not be "an impediment to litigation regarding basic rights and liberties." 122 Cong. Rec. S16,280 (daily ed. Sept. 22, 1976); *Sourcebook* at 63. And Representative Jordan summarized the statute as saying to potential litigants, "[y]ou are not to be deterred simply because you have to hire a lawyer." *Id.* at H12,164 (daily ed. Oct. 1, 1976); *Sourcebook* at 268.

Senator Kennedy told the Senate that the bill that became Section 1988 was not a "lawyers' relief bill." 122 Cong. Rec. S17,052 (daily ed. Sept. 29, 1976); *Sourcebook* at 200. His comments further demonstrate that Congress contemplated a traditional attorney-client relationship:

> The lawyer who undertakes to represent a client alleging a violation of the civil rights statutes covered by this bill faces significant uncertainty of payment, even where he has a strong case.
> * * *
> Even with enactment of this bill, the lawyer who undertakes to represent a client will face more uncertainty of payment than one involved

in a usual contingency fee case. His fee is contingent not only upon his success, but also upon the discretion of the judge before whom he appears.

Even if he wins his case, and the judge decides he has won a fee as well, his rate of compensation is fixed not by a grateful client, but by a disinterested judge.

Id. at S17,052; *Sourcebook* at 200-201.[16]

Petitioner's argument from the legislative history (Pet. Br. 12-18) ignores these statements and focuses instead on the status of organizational plaintiffs. It is true, as petitioner notes, that Congress enacted Section 1988 in the wake of this Court's decision in *Alyeska Pipeline Co.* v. *Wilderness Society*, *supra*, to remedy "an anomalous gap in [the] civil rights laws." S. Rep. No. 1011, *supra*, at 1. Petitioner is also correct in observing that the plaintiffs in *Alyeska* were organizations. As we have explained above, however, see pp. 17-18 *supra*, organizational plaintiffs are not the same as pro se lawyers, because organizations act only through their agents. Consequently, there is no basis for petitioner's contention that Congress, because it intended to permit organizations to recover attorney's fees, must have intended to permit pro se lawyers to recover fees as well.

[16] The hearings that resulted in Section 1988 focused on the problems of individuals who cannot afford to hire attorneys. See *Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973). The problem, as defined by Senator Tunney, was that numerous legal questions were not resolved "because people cannot afford legal counsel." *Id.* at 1. "[T]he cost of securing a lawyer affects the use, availability, and quality of representation." *Id.* at 3. Senator Cook, ranking minority member on the committee, had the same understanding: "[M]any people are unable to obtain a lawyer's services." *Id.* at 5. The subcommittee's aim was "to study ways in which the lawyer can more adequately make his services available to those who now feel that legal services are beyond their reach." *Id.* at 6. Senator Tunney described the effect of fee-shifting statutes as follows: "When an attorney is able to collect fees if he prevails * * *, he can take cases on behalf of average-income citizens and vindicate their rights." *Id.* at 788. And in summing up six days of hearings, Senator Tunney said that "[e]conomics, both in terms of what consumers can afford to pay and what lawyers can afford to work for, are the nub of the issue." *Id.* at 1253.

B. Awarding Attorney's Fees To Pro Se Litigants, Including Pro Se Lawyers, Undermines the Purposes of Section 1988

Petitioner, while recognizing that fee awards to pro se non-lawyers would raise policy concerns, Pet. Br. 18 n.7, contends that awards to pro se lawyers would further the Congressional purpose to promote "full and effective enforcement of the civil rights statutes." Pet. Br. 18. In our view, drawing a distinction between pro se lawyers and pro se non-lawyers would neither further the goals of Section 1988 nor promote effective enforcement of the civil rights laws.

1. In enacting Section 1988, Congress plainly did not intend to encourage pro se litigation. Indeed, Congress had precisely the opposite goal—to enable potential plaintiffs in civil rights actions to obtain legal representation. There is no reason to think that Congress intended a different approach in the case of pro se lawyers.

"The old adage that a lawyer who represents himself has a fool for a client is rooted firmly in many, many years of experience." *Aronson* v. *HUD*, 866

F.2d at 6. See also *Faretta* v. *California*, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting). A pro se lawyer, because of his personal stake in the case, lacks professional detachment and objectivity. These are important aspects of an attorney's service to a client. "It is axiomatic that effective legal representation is dependent not only on legal expertise, but also on a detached and objective perspective." *White* v. *Arlen Realty & Dev. Corp.*, 614 F.2d at 388. Petitioner suggests (Pet. Br. 16) that lawyers for public interest organizations may be less objective than pro se lawyers. But this overlooks the difference between a lawyer who is committed to a principle or a program of reform and a lawyer who is a party to the case. Experience has shown that the first type of commitment is consistent with professional objectivity; the second is not. To be sure, civil rights plaintiffs are entitled to vigorous advocacy. But vigorous advocacy is not incompatible with the exercise of professional judgment, and objectivity is no less desirable in civil rights cases than in other cases.

Pro se litigation by lawyers also raises ethical problems. The Model Code of Professional Responsibility states that

> [t]he roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC 5-9 (1980). See also Model Rules of Professional Conduct Rule 3.7 (1989). Although there is authority that testimony by a pro se lawyer does not violate the rules of professional ethics, see, *e.g.*, *Borman* v. *Borman*, 378 Mass. 775, 789, 393 N.E.2d 847, 856 (1979), it is nevertheless true that a lawyer who acts as both advocate and witness undermines his

effectiveness in both roles. It is unlikely that Congress intended to encourage lawyers to engage in such a practice.[17]

2. There is little risk that denying fees to pro se litigants will inhibit the filing of meritorious civil rights cases. The decision of the court of appeals in this case places lawyers on the same footing as all other potential pro se litigants. Lawyers are at least as capable of obtaining legal representation as non-lawyers. Of course, a lawyer who litigates a case pro se may hope not only to vindicate his civil rights but to earn a fee as well. But Congress clearly intended to promote the first goal and not the second. See 122 Cong. Rec. S17,052 (daily ed. Sept. 29, 1976) (Section 1988 is not a "lawyers' relief bill.") (statement of Sen. Kennedy). A pro se lawyer's interest in obtaining a fee award may cause him to pursue marginal litigation that would not be worthwhile to any client, and may influence the pro se lawyer to reject reasonable settlement offers that would reduce or eliminate his fee. Cf. *Evans* v. *Jeff D.*, 475 U.S. 717, 735 (1986).

3. Finally, it is "not * * * seemly to treat *pro se* lawyers differently than *pro se* lay litigants." *Aronson* v. *HUD*, 866 F.2d at 6. All pro se litigants, lawyers and non-lawyers alike, presumably devote time and energy to the litigation. "It is not just law-

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[17] In addition, if a pro se lawyer is not eligible to practice in the court in which the litigation takes place, he arguably violates at least the spirit of the ethical rule that a lawyer shall not encourage the unauthorized practice of law. See Model Code DR 3-101(B) (1980) ("A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."); Model Rule 5.5(a) (1989) ("A lawyer shall not * * * practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.")

yers whose time is 'their stock in trade'; it is everyone." *Jones* v. *Lujan*, 883 F.2d at 1036 (Silberman, J., concurring). Although pro se lawyers as a group may be more skilled than pro se non-lawyers as a group, Section 1988 limits fee awards to "prevailing parties." Thus, there is no convincing basis for arguing that prevailing pro se lawyers achieve better results than prevailing pro se non-lawyers. To allow lawyers, but not other citizens, to recover attorney's fees for pro se litigation smacks of favoritism towards the legal profession. A rule that "appear[s] to be especially solicitious for the economic welfare of lawyers" would not "enhance[] public respect for the bar or the judiciary." *Aronson*, 886 F.2d at 6.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282081 20256

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-79 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD B. KAY,

Petitioner,

v.

BREMER EHRLER AND THE KENTUCKY BOARD OF ELECTIONS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN URGING REVERSAL

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IN THE

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OCTOBER TERM, 1990

No. 90-79

RICHARD B. KAY,

Petitioner,

v.

BREMER EHRLER AND THE
KENTUCKY BOARD OF ELECTIONS,

Respondents.

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN URGING REVERSAL

INTERESTS OF *AMICUS*

This brief is filed, with the consent of the parties, on behalf of Public Citizen, a nationwide consumer advocacy organization with over 95,000 members. With the support of its membership, Public Citizen has promoted the enactment, and the vigorous use and enforcement, of federal laws providing for consumer protection, health and safety in the workplace, environmental protection, civil rights, and open government. Many of these laws entitle the prevailing litigant to an award of attorney's fees against the government or other party found to have violated their substantive provisions. Such fee-shifting encourages the vindication of important federal rights, which in some cases, such as this one, are successfully prosecuted *pro se* by a member of the bar. Public Citizen is concerned about the ruling below and its potential for discouraging liti-

gation of important public issues because it enables a losing party to gain a windfall and avoid paying attorney's fees under 42 U.S.C. § 1988 solely because the action was brought by an attorney who represented himself.

Moreover, because Public Citizen, through its staff of in-house attorneys, frequently represents itself in litigation, its interest in receiving fee awards may also be jeopardized by the ruling below. Thus, if the issue in this case is stated more broadly — whether a prevailing party appearing *pro se* may be awarded attorney's fees under federal fee-shifting statutes — Public Citizen's ability to obtain attorney's fees when it uses in-house attorneys to represent itself is called into question. Accordingly, Public Citizen is filing this brief to highlight a perspective that might not otherwise be presented by the parties.

STATEMENT OF THE CASE

The facts giving rise to this dispute are simple and uncontested. In August 1987, petitioner Richard Kay announced that he would run for President of the United States. He wrote to the Kentucky Secretary of State, requesting that his name be presented to respondent Kentucky Board of Elections ("the Board") for placement on the primary ballot. Kay also paid a $1,000 "deposit" to the Board pursuant to Ky. Rev. Stat. §118.611, which would be refunded only if Kay polled more than 3% of the total vote cast in his party's primary election, but would otherwise escheat to the Commonwealth. Petitioner's Appendix to Petition for Writ of Certiorari ("Pet. App.") at 23a-24a.

Kay was well aware that his proposed candidacy might be rejected. He had previously sought the Presidency in 1980 and had asked that his name be placed on the Kentucky primary ballot, but was refused by the Board pursuant to Ky. Rev.

Stat. §118.580 (repealed in 1982), which limited ballot access to "all . . . generally advocated and nationally recognized" candidates. Kay brought suit *pro se* at that time, and the court declared Ky. Rev. Stat. §118.580 unconstitutional on vagueness grounds and ordered that Kay's name be placed on the ballot. *Kay v. Mills*, 490 F.Supp. 844, 850 (E.D. Ky. 1980). He did not seek attorney's fees. Shortly after the decision in *Kay v. Mills*, the offending statute was repealed, but in 1986 the Kentucky Legislature enacted an identically worded statute, Ky. Rev. Stat. §118.581.

On January 11, 1988, Kay was notified that, because he was not a "nationally recognized" candidate, his name would not appear on the ballot. Pet. App. 20a. The next day, Kay once again filed suit *pro se* under 42 U.S.C. § 1983, asking that respondents be preliminarily enjoined to place his name on the primary ballot. He added a claim that his candidate's deposit under Ky. Rev. Stat. §118.611 be refunded, and he asked that both Ky. Rev. Stat. §118.581 and Ky. Rev. Stat §118.611 be declared unconstitutional. On January 13, 1988, having determined that Kay was the same person who had successfully challenged Kentucky's primary election law in 1980, respondents placed Kay's name on the ballot. Pet. App. 20.

The parties thereafter cross-moved for summary judgment on the remaining claims. The district court referred the case to a magistrate, who recommended that Ky. Rev. Stat. § 118.581 be declared unconstitutional, relying on the district court's prior decision in *Kay v. Mills, supra*. In addition, the magistrate recommended that the candidate's deposit statute be declared unconstitutional under the due process and equal protection clauses because it "impose[d] fees only on minority candidates." Pet. App. 20a-24a. With respect to the attorney's fees issue, the magistrate urged that fees be denied on the basis of the Sixth Circuit's decision in *Falcone v. I.R.S.*, 714 F.2d 646 (1983), *cert. denied*, 466 U.S. 908 (1984), which held

that an attorney proceeding *pro se* is not entitled to fees under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The district court reviewed the magistrate's recommendations *de novo* and concurred in all respects, including the denial of attorney's fees. Pet. App. 12a-17a.

The case was appealed on the issue of attorney's fees alone, and the Sixth Circuit affirmed, in a split decision. The court of appeals recognized the division among the circuits on the issue of whether an attorney proceeding *pro se* is entitled to fees under § 1988, and under the FOIA as well, but believed that it was required by its prior decision in *Falcone*, *supra*, to deny such an award under § 1988. Judge Jones dissented, indicating that Kay was entitled to fees, notwithstanding *Falcone*, based on what he perceived as differences between the underlying purposes of the FOIA's fee-shifting provision and those expressed in § 1988. Pet. App. 9a-11a.

ARGUMENT

THE DECISION BELOW SHOULD BE REVERSED

The narrow question presented by this case — whether a defendant can avoid liability for attorney's fees under 42 U.S.C. § 1988 simply because the prevailing plaintiff was an attorney who represented himself in the litigation — is an important one. Indeed, the facts of this case illustrate that attorneys proceeding *pro se* can, and do, vindicate important constitutional and statutory rights. Petitioner Richard Kay established not only his own right not to be excluded from Kentucky's presidential primary on the basis of an unconstitutionally vague statute, but also assured that future minority candidates will have lawful access to the ballot and voters will have a broader choice of candidates to consider. Pet. App. 21a. Moreover, Kay's litigation efforts have secured the rights of all potential candidates not to be subjected to Kentucky's discriminatory

deposit statute, which amounted to a $1,000 penalty solely on minority candidates.

Similar rights were vindicated in the leading *pro se* attorney's fees case of *Duncan v. Poythress*, 777 F.2d 1508 (11th Cir. 1985)(*en banc*), *cert. denied sub nom.*, *Poythress v. Kessler*, 475 U.S. 1129 (1986), where an attorney secured the constitutional rights of all Georgia voters by obtaining an order directing state officials to call a special election for the state Supreme Court. *See also Shakman v. Democratic Organization of Cook County*, 634 F. Supp. 895, 901 (N.D. Ill. 1986) (*pro se* attorney awarded fees under § 1988 in case involving conspiracy to deprive plantiffs of their constitutional rights to a fair political and electoral process); *Rybicki v. State Board of Elections*, 584 F. Supp. 849 (N.D. Ill. 1984)(three-judge district court) (action brought by *pro se* attorney setting aside statewide legislative redistricting plan).

In light of their specialized training and sensitivity to the rule of law, it is not surprising that it is often lawyers who "search for violations of constitutional and statutory rights and then seek to vindicate those rights. . . ." *Duncan*, 777 F.2d at 1515. Because such litigation is fully consistent with the language and purpose of § 1988 and other fee-shifting statutes, *id.*, it would be anomalous to deny fees to plaintiff-attorneys who represent themselves. Indeed, as argued more fully in petitioner's brief, it would produce an even bigger windfall to losing parties than would the award of reduced hourly rates based on costs alone, a construction of § 1988 which this Court unanimously rejected in *Blum v. Stenson*, 465 U.S. 886 (1984).

The Sixth Circuit relied on its prior decision in *Falcone*, *supra*, interpreting the FOIA, to deny petitioner fees on the ground that § 1988's " 'plain language,' " " assumes a pay-

ing relationship between an attorney and a client." Pet. App. 8a, *quoting Falcone*, 714 F.2d at 648. The court of appeals erred in this respect since neither § 1988 nor any other major fee-shifting statute explicitly requires an attorney-client relationship, let alone a fee-paying one. *See Blum, supra* (work of legal services attorneys, who receive no payment from their clients, fully compensable under § 1988). More importantly, from *amicus'* perspective, if such a relationship is indeed critical to an award of fees, which we think extremely implausible, then the Sixth Circuit's decision casts doubt on the eligibility for fees of organizational plaintiffs, such as businesses, public interest organizations, and local governmental units, which regularly proceed *pro se* to vindicate federal constitutional and statutory rights. If, as we now show, it would be contrary to Congressional intent and sound public policy to deny fees to organizations proceeding *pro se*, there is no reason to deny them to individual attorneys who represent themselves.

To deny organizational plaintiffs fees when their in-house counsel represents them would penalize those organizations for the efficient use of their resources and undermine Congress' design, not only with respect to the scope of its fee-shifting provisions, but as to the full achievement of the goals of its substantive enactments as well. While our concerns apply to all legislation providing for an award of attorney's fees, Congressional efforts in three areas — environmental protection, the Equal Access to Justice Act, and the FOIA — underscore our position that organizations proceeding *pro se* and, logically therefore, all *pro se* attorneys, are eligible for statutory fee awards.[1]

Nearly all of the significant federal environmental legislation

[1]Because petitioner's brief fully addresses the legislative history under § 1988 endorsing the award of fees to *pro se* organizations, we do not discuss it here. *See* H.R. Rep. No. 1558, 94th Cong. 2d Sess. 8 n.16 (1976).

allows the court to award attorney's fees to the prevailing party in litigation. *See, e.g.*, 16 U.S.C. § 1540(g)(4)(attorney's fees in citizen suits to enforce Endangered Species Act); 33 U.S.C. § 1365(d)(Federal Water Pollution Control Act); 42 U.S.C. § 7604(d)(Clean Air Act); 43 U.S.C. § 1349(a)(5)(Outer Continental Shelf Lands Act). The legislative histories of these enactments illustrate Congress' understanding that organizations dedicated to environmental conservation would be at the forefront in enforcing such legislation. *See, e.g.*, S. Rep. No. 414, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3745, 3747 (recognizing that "groups" are among those persons who will bring suit to enforce Water Pollution Control Act, and because, in doing so, such litigants are "performing a public service," the court should "award costs of litigation to such party"); H.R. Rep. No. 590, 95th Cong., 2d Sess. 161, *reprinted in* 1978 U.S. Code Cong. & Admin. News 1567 (citizen suits under Outer Continental Shelf Lands Act may be brought by anyone who can show an actual interest in the litigation, including entities that meet the requirements for organizational standing under *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

Because Congress has enacted broad citizen suit provisions for the enforcement of its environmental laws, and has indicated that public interest organizations would play an important enforcement role, it would do extreme violence to Congress' purpose in enacting both the citizen suit provisions and their fee-shifting components, to deny such organizations attorney's fees simply because they represent themselves.[2] It

[2]It is common knowledge that the major environmental organizations such as the Sierra Club, the National Resources Defense Council, the Wilderness Society, and the Environmental Defense Fund, are, in large part, public interest law firms which represent themselves in litigation. Indeed, the vast majority of reported decisions under the federal environmental laws have been litigated, at least in part, by one of these organizations.

is thus not surprising that there is a large body of case law that routinely, and without discussion of the *pro se* character of the representation, awards attorney's fees to environmental organizations for the work of their in-house counsel. *See, e.g.*, *Sierra Club v. EPA*, 769 F.2d 796, 808-09 (D.C. Cir. 1985); *Environmental Defense Fund, Inc. v. EPA*, 672 F.2d 42, 50-51 (D.C. Cir. 1982); *Conservation Law Foundation of New England v. Watt*, 654 F. Supp. 706 (D. Mass. 1984); *National Trust For Historic Preservation v. Corps of Engineers*, 570 F. Supp. 465, 472 (S.D. Ohio 1983) (with respect to attorney's fee rates, "the law is clear that institutional attorneys are to be treated no differently than private attorneys"). Indeed, so strong is the presumption that public interest groups will be the prime enforcers of our environmental protection legislation, that the federal government has argued, albeit unsuccessfully, that *only* such "watchdog groups" are entitled to fee awards. *Florida Power & Light Co. v. Costle*, 683 F.2d 941, 942-43 (5th Cir. Unit B 1982); *see also Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 5 (D.C. Cir. 1982)(awarding fees to in-house counsel for the District of Columbia Government).

In only two cases have courts addressed the issue of eligibility for attorney's fees of an organization proceeding *pro se*, both in the environmental law context. In *Natural Resources Defense Council v. EPA*, 484 F.2d 1331 (1st Cir. 1973), the court considered the government's amorphous contention that a public interest organization " 'formed for the purpose of litigating against the government' . . . should be denied attorneys' fees." *Id.* at 1338 n.7. Relying on Congress' recognition that "public interest organizations would conduct a great deal of litigation" under the Clean Air Act, the court dismissed the argument summarily: "If Congress desired to use the award of fees to encourage meritorious litigation and to discourage frivolous suit, the identity of the party, and the source of its counsel, would be of little moment." *Id.*

In *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 762 F.2d 272 (3rd Cir. 1985), *affirmed in part and reversed in part on other grounds*, 478 U.S. 546 (1986), the Third Circuit responded to the government's argument — illustrative of the concerns expressed by *amicus* herein — that decisions holding *pro se*, *non*-lawyers ineligible for attorney's fees require that organizations represented by in-house counsel also be denied fees. The court rejected that position, noting that it "conflicts significantly with the purposes of the citizen suit provisions of the Clean Air Act." *Id.* at 278. Moreover, the court indicated that such a rule would be inefficient, "forcing the use of more expensive outside counsel, creat[ing] a disincentive for any public interest or citizens group contemplating the institution of litigation to benefit the environment." *Id.* Of course, the same rationale applies to *pro se* individual attorneys, such as Kay, who, in order to be eligible for fees, would first need to assess the facts before deciding whether litigation is appropriate, then confer with at least one other lawyer, enter into a fee arrangement with the lawyer who ultimately decided to take the case, and then, throughout the litigation, spend time conferring with that lawyer. Such additional use of resources would serve no purpose where, as here, the plaintiff is already a licensed attorney. *See Duncan*, 777 F.2d at 1613-15.

The Equal Access to Justice Act ("EAJA") also provides for an award of fees to certain private parties in litigation against the federal government where the government's position in the litigation or its underlying administrative conduct was not "substantially justified." 28 U.S.C. § 2412(d).[3] Fees may be awarded to individuals whose net worth does not exceed $2

[3]The EAJA was originally enacted for a three year period in 1980 (effective October 1, 1981), and was made permanent in 1985. *See* P.L. 96-481, 96 Stat. 2325; P.L. 99-80, 99 Stat. 183.

million and to organizations with a net worth of not more than $7 million. The legislative history from both the original enactment in 1980 and the reenactment in 1985 make abundantly clear that the primary purpose of the legislation was to aid small businesses in their disputes with the federal government and to provide them with an incentive to challenge onerous governmental action. *See, e.g.*, H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4991; S. Rep. No. 253, 96th Cong., 1st Sess. 5 (1979) (EAJA was a response to "evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue"); H.R. Rep. No. 120, 99th Cong., 1st Sess. 8 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 136 ("The legislation is a high priority for the small business community"). In addition, nearly every Member of Congress who spoke during the floor debate on the legislation noted the importance of the EAJA to small businesses facing oppressive and capricious governmental conduct. *See generally* 131 Cong. Rec. S9991-98 (daily ed. July 24, 1985); 131 Cong. Rec. H4760-64 (daily ed. June 14, 1985). *See also* 21 Weekly Comp. of Pres. Doc. 966-67 (August 5, 1985)(statement of the President approving "this important program that helps small businesses . . . fight faulty government actions . . .").

Small businesses often employ in-house counsel who litigate, or assist in litigating, their disputes. It thus would defy reason, given Congress' purpose in enacting the EAJA, that small businesses should either forego fees for work done by their in-house counsel, on the ground that the organization is proceeding *pro se*, or be forced to pay outside counsel, so that an EAJA award would be available if the government's position proves to be insubstantial. Indeed, compelling such a Hobson's choice would be particularly damaging to Congressional intent in the EAJA context, which limits fees to $75 per hour,

adjusted for inflation, even where the market rate exceeds that figure. 28 U.S.C. § 2412(d)(2)(A); *see Pierce v. Underwood*, 487 U.S. 552, 571-72 (1988). The choice is thus between using in-house counsel at cost, but without any hope of an EAJA award, or, in order to preserve the possibility of such an award, using more expensive outside counsel whose market rate is not fully compensable under the EAJA.[4]

However, the rationale employed by the Sixth Circuit to deny Kay fees would apply fully if the fee applicant were an attorney who was the sole owner and employee of a small business and had prevailed in litigation with the federal government. But to deny the applicant fees under the EAJA on the basis of his or her *pro se* status in that dispute would run counter to Congress' desire to place private citizens and small businesses on a more equal footing with the federal government when challenging governmental action. H. Rep. No. 120, *supra*, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132-33; *see Jones v. Lujan*, 883 F.2d 1031, 1035 (D.C. Cir. 1989) (awarding fees to *pro se* attorney and noting that the EAJA "in no way rules out an attorney legitimately representing himself").

Finally, it is useful to consider the FOIA, which allows an award of attorney's fees to plaintiffs who have substantially prevailed in their efforts to obtain the release of records from the federal government. *See* 5 U.S.C. § 552(a)(4)(E). Although, as petitioner has indicated, *see* Petition at 9, there is a split among the circuits as to whether fees should be awarded to prevailing *pro se* FOIA plaintiffs who are licensed attorneys, the reasons to allow such awards are compelling.

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[4]The EAJA also allows fees to a unit of local government with a net worth not exceeding $7 million. 28 U.S.C. § 2412(d)(2)(B). Small towns and counties also often employ attorneys which allows those entities, at least in part, to proceed *pro se* in litigation.

The relatively large volume of FOIA cases successfully litigated by *pro se* attorneys indicates that those attorneys have been particularly vigilant in demanding that the government release records which, by law, may not be kept from public scrutiny. *See, e.g., Falcone*, 714 F.2d 646; *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051 (5th Cir. 1983); *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977). To force such plaintiffs either to relinquish their opportunity for a fee altogether, or to inefficiently litigate the case through another attorney, would substantially frustrate the purposes of open government undergirding the Act.

Amicus Public Citizen regularly litigates under the FOIA in order to obtain and publicly disseminate information about governmental operations, public health and safety, and other vital matters that would otherwise remain behind closed doors. Although *amicus* uses its own attorneys to represent itself in such litigation, it would not have to do so if it meant jeopardizing the possibility for attorney's fees because it could generally substitute an individual staff member willing to prosecute the action in his or her name, thereby making the representation no longer *pro se*. However, to engage in such machinations would also be inefficient and, more fundamentally, serve no purpose under the FOIA or its fee-shifting provision.

This discussion also has applicability to petitioner's situation. Kay could have formed a non-profit membership corporation named "Kay for President" and, presumably, brought the action in the organization's name, with Kay as counsel. So long as he was not a member or employee of that organization, neither Kay nor the organization would be proceeding *pro se*. Thus, he could have achieved the same results as he did in this litigation, set important constitutional precedent, and, consistent with the rationale of the court below, been

awarded a fee under § 1988. This scenario points out the peril of deciding the question presented by going beyond the language and purposes of § 1988 — which seeks to encourage the use of lawyers to bring cases affecting important constitutional and statutory rights — to avoid imagined concerns, such as the creation of a so-called "cottage industry" of underemployed lawyers, Pet. App. 7a, which find no expression in Congress' explicit mandate or its legislative history. *See* S. Rep. 1011, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5910 (purpose of § 1988 is to encourage vindication of civil rights); *see also Duncan*, 777 F.2d at 1515 (rebutting "cottage industry" argument). Prevailing *pro se* litigants, whether appearing as individual attorneys or organizationally through in-house counsel, have ably served the purposes of § 1988, and they should not be denied an award of fees solely on the basis of their *pro se* status.

CONCLUSION

For the reasons stated above, the decision of the Sixth Circuit should be reversed.

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November 15, 1990

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No. 90-79

Supreme Court, U.S.
FILED
DEC 19 1990
CLERK

In The

Supreme Court of the United States

October Term 1990

RICHARD B. KAY,

Petitioner,

vs.

BREMER EHRLER, and THE KENTUCKY BOARD of ELECTIONS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALABAMA, ALASKA, ARKANSAS, DELAWARE, FLORIDA, IDAHO, INDIANA, IOWA, KANSAS, MICHIGAN, MISSOURI, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, UTAH, VERMONT, VIRGINIA, AND WYOMING IN SUPPORT OF RESPONDENTS

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The amici States enumerated above, by their respective Attorneys General, submit this brief in support of affirmance of the judgment of the United States Court of Appeals for the Sixth Circuit entered in the proceeding below on April 13, 1990.

INTEREST OF AMICI CURIAE

The amici States, like all States, employ officials who are potentially subject to suits under 42 U.S.C. §§ 1981, 1982, 1983, 1985 & 1986, title IX of Public Law 92-318 and title VI of the Civil Rights Act of 1964, *see, e.g., Ex Parte Young*, 209 U.S. 123 (1908), and thus are subject to potential liability for payment of "reasonable attorney's fees as part of the costs" to "prevailing part[ies]" under 42 U.S.C. § 1988. They thus have a vital and ongoing interest in seeing that the judgment below, denying attorney's fees to a *pro se* attorney plaintiff who prevailed in his civil rights case, is affirmed. The States have the obvious interest in protecting their treasury from the potentially devastating costs of paying opposing parties' attorney's fees.

ARGUMENT

A. Plaintiff has No Standing to Claim Attorney's Fees as a *Pro Se* Attorney Plaintiff Because the Record Does Not Establish That He Was Licensed to Practice Law in Kentucky.

The plaintiff brought his suit in the United States District Court for the Eastern District of Kentucky. Although the record indicates that plaintiff is licensed to practice law in the state of Florida, the record does not in any way suggest, let alone establish, that plaintiff was licensed to practice before the United States District Court for the Eastern District of Kentucky. This Court has ruled that "the existence of a justiciable 'case' or 'controversy' under Article III, must affirmatively appear in the

record. As the first Justice Harlan observed, 'the presumption . . . is that the court below was without jurisdiction' unless 'the contrary appears affirmatively from the record.' " *Bender v. Williamsport Area School District*, 475 U.S. 534, 546 (1986) (quoting *King Bridge Co. v. Otoe County*, 120 U.S. 225, 226 (1887)) (footnote omitted); see also *Bender*, 475 U.S. at 550 (Marshall, J., concurring).

Because plaintiff has therefore failed to establish that he was a licensed attorney before the federal district court, he had no standing to argue before either the federal district court or the United States Court of Appeals that a *pro se attorney* plaintiff is entitled to attorney's fees under § 1988. A favorable decision on his claim that a *pro se attorney* plaintiff is entitled to attorney fees would not remedy his injury. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). He only has standing to argue that a *pro se non-attorney* plaintiff is entitled to attorney's fees.

B. A *Pro Se* Attorney Plaintiff Is Not Entitled to Attorney's Fees Under 42 U.S.C. § 1988.

1. The Plain Language of the Statute Disallows Fees.

42 U.S.C. § 1988 gives the court discretion to award "a reasonable attorney's fee as part of the costs." It is beyond dispute that when an attorney represents himself or herself there are no attorney's fees at all. No attorney's fees are charged and none are paid, for there simply is no attorney-client relationship. *Cf. Davis v. Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (Section 1988 "presupposes a relationship of attorney and client that is lacking in the

instant case."); *Duncan v. Poythress*, 777 F.2d 1508, 1517-19 (Roney, J., dissenting) (attorney's fees should not be allowed to a pro se "attorney" because there is no actual "attorney" as the word "attorney" is defined in any dictionary in terms of someone who acts *for another*, a situation that does not exist where an attorney represents himself).[1] Consequently, under the plain language of the statute, a *pro se* attorney plaintiff cannot be awarded attorney's fees because there was no attorney-client relationship and there were no attorney's fees incurred. *See Davis; see also O'Connell v. Zimmerman*, 321 P.2d 161, 165 (Cal. Dist. Ct. App. 1958) (State statute allowing recovery of "reasonable attorney fees incurred" does not authorize payment to a *pro se* attorney because "he has paid no fee nor has he incurred any liability to pay an attorney fee.").

Furthermore, 42 U.S.C. § 1988 provides for attorney's fees "as part of the costs." This modifying language reinforces the notion that an award of fees is only appropriate where attorney's fees have actually been incurred. *See Lawrence v. Staats*, 586 F. Supp. 1375, 1379 n. 4 (D.D.C. 1984). The *pro se* attorney may have to pay court costs and other costs incurred in connection with his or her lawsuit, but attorney's fees are surely not paid as part of the costs. To stretch the term "costs" to include "opportunity costs" would amount to unwarranted judicial legislation contradicting the plain meaning of the word "costs." Had

[1] It is this lack of an attorney-client relationship that makes petitioner's reliance on *Blum v. Stenson*, 465 U.S. 886 (1984), inapposite. In *Blum*, the prevailing party was represented by Legal Aid Society attorneys and thus there was clearly an attorney-client relationship.

Congress intended to include "opportunity costs" within the meaning of Section 1988, it surely would have used language that more specifically addressed the matter.

2. The Legislative History and Purposes Behind the Statute Demand That Fees Not Be Awarded To a *Pro Se* Attorney.

The Senate Report on the Civil Rights Attorney's Fees Award Act of 1976 states:

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, 94th Cong., 2d Sess 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5910.

Not only does the plain language of the statute reject the awarding of attorney's fees to *pro se* attorney plaintiffs as discussed above, but equally importantly, it is completely unnecessary for a *pro se* attorney plaintiff to receive an award of attorney's fees in order to ensure that citizens have a "meaningful opportunity to vindicate [their civil rights]."

The most obvious reason is that unlike a non-attorney who must hire and pay an attorney to pursue his or her civil rights claim, the *pro se* attorney does not have to hire or pay anyone to pursue his or her claim. There is no financial burden of legal fees deterring or preventing the *pro se* attorney from pursuing his or her claim. See *Lawrence v. Staats*, 586 F.Supp. at 1379. Denying the *pro se* attorney a surplus award of "attorney's fees" does not impinge on the attorney's ability to pursue his or her claim. By representing himself or herself, the *pro se* attorney has a "meaningful opportunity" to vindicate his or her rights.

Although it can be argued that the *pro se* attorney does incur the opportunity costs of having to give up other legal work while he or she pursues his or her own civil rights claim, this opportunity cost exists for *pro se non-attorneys* as well. For the carpenter and doctor who proceed *pro se* must also give up fees from their respective businesses to pursue their claims, too. And yet the circuit courts are unanimous in denying attorney's fees to *pro se* non-attorneys. *See, e.g., Gonzalez v. Kangas*, 814 F.2d 1411 (9th Cir. 1987) (and cases cited therein). If it is not necessary to award fees to *pro se* non-attorneys to cover their opportunity costs to provide them with a meaningful opportunity to vindicate their rights, then it is equally unnecessary to award fees to *pro se* attorneys to allow them to vindicate their rights. *See Lawrence v. Staats*, 586 F.Supp. at 1379 (finding "no reason to draw a distinction between *pro se* non-attorneys, who cannot recover fees, and *pro se* litigants who are attorneys.").

Furthermore, it is fundamentally illogical to award attorney's fees for opportunity costs. Opportunity costs

reflect not the value of legal services provided, but the value of the services that are given up to pursue the civil rights claim. The statute provides for fees for the former and not the latter. *See Blum v. Stenson*, 465 U.S. 886, 892 & 895 (1984) (fees under section 1988 are to be calculated according to prevailing market rates and not according to the cost of providing the services). Thus, awarding opportunity costs would violate this Court's ruling in *Blum*.

To award market rate fees, however, could yield windfalls. To illustrate, the *pro se* attorney in pursuing his own civil rights claim may have to forego, say, 50 hours of time he would otherwise spend on very low-paying legal work that would generate only, say, $25 per hour, whereas the legal work he does on his civil rights claim may have a market rate of, say, $100 per hour. An award of $1250 would compensate the attorney for his lost time and would thus be adequate to prevent his being deterred from bringing or unable to bring his civil rights suit. But under Section 1988, an award of "reasonable attorney's fees" would mean the *pro se* attorney would get $5000. *See Blum*. The attorney would thus get a windfall of $3750, a bonus not intended by Congress. *See* S. Rep. No. 94-1011, supra, at 5913 (The fees should be "adequate to attract competent counsel, but which do not produce windfalls to attorneys."); *Cofield v. City of Atlanta*, 648 F.2d 986, 988 (5th Cir. 1981) ("the purpose of section 1988 is not to compensate a worthy advocate but to enable and encourage a wronged person to retain a lawyer"); *see also Davis v. Parratt*, 608 F.2d 717, 718 (8th Cir. 1979); *Turman v. Tuttle*, 711 F.2d 148, 149 (10th Cir. 1983).

Only by confining fee awards to only those parties who actually retain an attorney can an inappropriate windfall be avoided. Although an award of fees equal to actual opportunity costs could avoid windfalls, such an award would be wholly unjustified in terms of the plain language of the statute and *Blum's* determination that one receives the market value of the services provided, not the cost of providing that service. *See Blum*, 465 U.S. at 892 & 895. Finally, such an award would impose an extremely difficult problem of proof. *See Falcone v. I.R.S.*, 714 F.2d 646, 648 (6th Cir. 1983). How would one calculate the value of the work the lawyer gave up? Did the lawyer have a full load of work such that time spent on his or her civil rights action actually took away from productive attorney time?

Contrary to the argument made by some courts that it would be "relatively simple to value [the opportunity lost] where the pro se litigant is an attorney, for the work foregone is of the same nature as that actually performed," *Cazalas v. United States Department of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983), the value of the work foregone is very difficult to calculate simply because it is never clear exactly what work was foregone. Moreover, the legal work foregone may not at all be of the same nature as the work actually performed, for a patent attorney's work differs greatly from a civil rights claim.

The Senate Report's reference to the fact that in "many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer," further supports not awarding *pro se* lawyers attorney's fees. The *pro se* attorney does not need any money to hire a lawyer for he or

she handles the legal matter on his or her own and incurs no liability for fees.

Congress' purpose in enacting § 1988 of enabling civil rights litigants to obtain competent counsel, *see Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989), is not served by granting fees to a *pro se* attorney. The attorney plaintiff is not going to forego professional representation because he would not be awarded fees for representing himself, but may simply choose to hire outside counsel.

Finally, to the extent an attorney must bear a large opportunity cost in handling his or her own case, the non-payment of fees would not deter her from bringing her civil rights action *at all*, but would only at best encourage her to hire an outside attorney to bring the suit. Thus, the Act's goal of providing citizens with a "meaningful opportunity" to vindicate important rights would not be compromised in the least by refusing to award attorney's fees to *pro se* attorneys. The attorney could choose to simply hire an outside attorney to handle her case knowing full well that if they prevail they will be entitled to reasonable attorney's fees.

Moreover, encouraging an attorney to hire an outside attorney as opposed to representing herself *pro se* actually furthers one of the purposes behind the Act. One of the purposes behind the fee provision is to encourage the hiring of competent counsel, *see* S. Rep. No. 94-1011, *supra* at 5913, which has the additional benefit of screening out unnecessary and unwarranted litigation. *See Falcone v. I.R.S.*, 714 F.2d 646, 647 (6th Cir. 1983). An attorney who represents himself may not have the "objectivity and

detachment that an outside attorney can provide as a check against groundless or unnecessary litigation." *Pitts v. Vaughn*, 679 F.2d 311, 313 (3d Cir. 1982).

Finally, the hiring of outside counsel avoids the problems that arise when an attorney serves as an advocate and as a witness in the same case, a situation likely to arise when the lawyer is a plaintiff in a civil rights action. The ABA Model Code of Professional Responsibility (1980) states:

> EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the case of another, while that of a witness is to state facts objectively.

Thus, denying attorney's fees to *pro se* attorneys would serve to encourage attorney plaintiffs to hire outside counsel and would thereby promote more effective litigation.

In sum, because the plain language of Section 1988 does not provide for attorney's fees to pro se attorneys, and denial of fees would not only not deprive civil rights litigants of a "meaningful opportunity" to vindicate their rights, but would actually promote more effective litigation, this Court should conclude that Section 1988 does

not allow the award of attorney's fees to *pro se* attorney plaintiffs.

CONCLUSION

For the foregoing reasons, we respectfully request that this court affirm the judgment of the Court of Appeals.

Dated: Honolulu, Hawaii, December 19, 1990

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